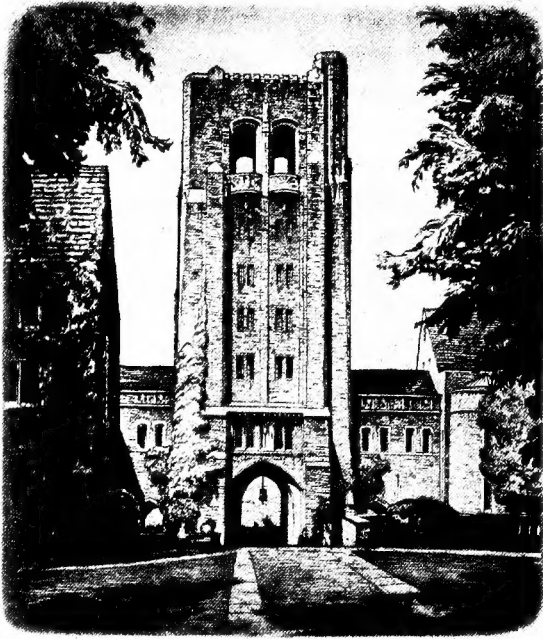


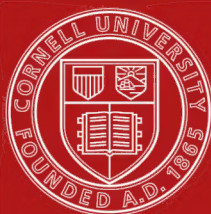


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SELWYN'S

ABRIDGMENT
OF THE
LAW OF NISI PRIUS.

VOL. II.

22. FRAUDS, STATUTE OF.
23. GAME.
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35. SHIPPING.
36. SLANDER.
37. STOPPAGE IN TRANSITU.
38. TRESPASS.
39. TROVER.
40. USE AND OCCUPATION.

Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si totius operis
fides uniuscujusque periodi fide niteretur. PRÆF. 6 REP.

THIRTEENTH EDITION.

BY

DAVID KEANE, Q.C.,

RECORDER OF BEDFORD;

AND

CHARLES T. SMITH, M.A.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

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AN ABRIDGMENT

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THE STATUTE OF FRAUDS, the provisions of which have been so often commended (a), originated with Lord *Nottingham*, who probably was assisted by Sir *Matthew Hale*, Sir *F. North*, and Sir *Leoline Jenkins*, an eminent civilian (b). Sir *M. Hale*, however, died a few months before the act passed into a law (c); and this

(a) "It is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our Statute Book." *Per Lord Kenyon*, C. J., in *Chaplin v. Rogers*, 1 East, 194. See also *per Lord Kenyon*, C. J., in *Chater v. Becket*, 7 T. R. 204; *per Bayley*, J., in *Saunders v. Wakefield*, 4 B. & A. 600; *per Abbot*, C. J., in *Baldey v. Parker*, 2 B. & C. 40; *Ld. Campbell's Lives of the Chancellors*, vol. 3, p. 421.

(b) See *Ash v. Abdy*, 3 Swanst. 664; *Gilb. Eq. R.* 171; *Lord Keeper Guildford's Life*, p. 109; *per Lord Ellenborough*, C. J., in *Wain v. Walters*, 5 East, 17; *Lord Campbell's Lives of the Chancellors*, vol. 3, p. 421.

(c) Sir *M. Hale* died on the 25th of December, 1676. Parliament met on the 15th of February following, and this statute received the royal assent on the 16th of April, 1677.

circumstance may possibly account for the inaccuracies which have been discovered in the composition (d), and justify the inference made by Lord *Mansfield*, that the statute was not drawn by that eminent judge ; more especially as the bill was introduced in the usual manner, and not upon any reference to the judges (e).

I. Sections 1, 2, & 3, and 8 & 9 Vict. c. 106, s. 3, as to Parol Demises, Assignments, and Surrenders.

1st Section.—By this statute, for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury, it is enacted, that “All leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing (f), shall have the force and effect of leases, or estates at will only.”

2nd Section.—“Except all leases, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts, at the least, of the full improved value of the thing demised.”

By 8 & 9 Vict. c. 106, s. 3—“A feoffment, made after the 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by a deed ; and a partition and an exchange of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, &c. made after the said 1st day of October, 1845, shall also be void at law, unless made by deed.”

The general effect of these enactments, so far as relates to leases, appears to be, that all ordinary leases for terms exceeding three years from the making, must, in order to be valid, be by deed : that leases for terms not exceeding three years from the making, at two-thirds the full improved value of the thing demised, may be made by writing or word of mouth ; and all other contracts relating to any interest in land, including agreements to grant a lease, must be in writing under the fourth section, to be more fully treated of.

“The first section seems to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is

(d) See Doug. 244, n.

(e) See *per* Lord *Mansfield*, C. J., in *Wyndham v. Chetwynd*, 1 Burr. 418.

(f) Under this section the agent must

be authorized in writing, in cases under the 4th and 17th sections he need not. See *post*, p. 804.

equally within the first, unless it come within the saving of the second section" (g).

All Leases, Estates, &c.—"An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, as it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section" (h).

It is not necessary that a lease of turnpike tolls should be by deed (i).

Where a written document contains words of present demise or terms such as to show the intention of the parties to have been to make it operate as a lease for more than three years, it will be void as such, unless under seal, notwithstanding that it purports on its face to be an *agreement* (k). A lease by parol for a year and a half, to commence on the expiration of a lease which wants a year of expiring, is good; for it does not exceed three years from the making (l). But a parol lease for three years, *from a future day*, is void (m). The effect of the Statute of Frauds, as far as it applies to parol leases, whether to commence *in presenti* or *in futuro*, provided they do not exceed three years from the making, is this, that the leases are valid, and whatever remedy can be had upon them, in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession (n). In *Edge v. Strafford* (o), accordingly, it was held, that a verbal agreement to take ready furnished lodgings "for two or three years," inasmuch as it did not exceed three years, was valid as a lease; and whatever remedy could be had upon it, in the character of a lease, might be resorted to; but being a contract for an interest in land, and consequently falling within the fourth section, which requires a note in writing, no action could be supported for not entering on or occupying the demised premises. A lease by deed is not required by the first section of the Statute of Frauds to be signed as well as sealed (p); and the Court of Exchequer has intimated a strong opinion that a deed is not within either the first or fourth sections (q).

(g) Sugd. V. & P. (13th edit.) p. 97.

(h) *Ibid.*

(i) *Shepherd v. Hodsmen*, 18 Q. B. 316; 3 Geo. IV. c. 126, s. 57.

(k) *Stratton v. Pettit*, 16 C. B. 420. See however *Parker v. Taswell*, 27 L. J., Ch. 812, *post*, 862.

(l) *Ryley v. Hicks*, *per Raymond*, C. J., B. N. P. 177; 1 Str. 651, S. C.; but probably from a different note. In *Inman v. Stamp*, B. R. Trin. 55 Geo. III., *Dampier*, J., said the practice had been with the foregoing case of *Ryley v. Hicks*, although he rather inclined to think that the 2nd section of the statute, taken with

section 4, was confined to leases executed by possession, on which two-thirds of the improved rent was reserved.

(m) *Tress v. Savage*, 4 E. & B. 36; *Baker d. Nelson v. Reynolds*, B. R. E. 1785, from Mr. Balguy's note, Serjeant Hill's MSS. vol. 21, p. 167; *Rawlins v. Turner*, 1 Ld. Raym. 736; 12 Mod. 610.

(n) *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 295.

(o) *Ibid.*

(p) *Aveline v. Whisson*, 4 M. & G. 801; *Cooch v. Goodman*, 2 Q. B. 580.

(q) *Cherry v. Heming*, 4 Exch. 631.

A parol demise, valid under the second section, may be as special in its terms as a regular lease; and the stipulations it contains may be proved by parol (*r*). Where the lessee of a house, and his partner in trade, agreed to pay the lessor annually, during the residue of the lessee's term, ten per cent. on the cost of new buildings if the lessor would erect them; it was held, 1. That this agreement was not required by the Statute of Frauds to be in writing, as being collateral to the existing contract between the lessor and the lessee, and not being a demise of the new buildings. 2. That although the partner quitted the premises, he was liable on the agreement, jointly with the lessee, during the residue of the term (*s*). So where a landlord who had demised premises by a lease for a term of years at 50*l.* a year, after some years were expired, agreed with the tenant to lay out 50*l.* in making improvements upon them, the tenant undertaking to pay the landlord an increased *rent* of 5*l.* a year during the remainder of the term, to commence from the quarter preceding the completion of the work: the agreement was reduced into writing, but the defendant refused to sign it. The improvements were finished in November, 1827, and the defendant, after the Christmas following, paid the increased rent for that quarter; but refused to pay it afterwards. An action of *assumpsit* having been brought for the arrears for two years and upwards; it was held, that the landlord was entitled to recover; and that the case did not fall within the statute, for, though called a rent, it was not so in the strict technical meaning of the term; it was a matter of mere personal contract (*t*).

Any uncertain Interest in Land.—In *Wood v. Lake* (*u*), the defendant had agreed, by parol, that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant, for the term of seven years; and that during this term the plaintiff should have the sole use of that part of the close (*x*). After the plaintiff had, pursuant to this agreement, enjoyed the liberty of stacking coals for three years, the defendant locked up the gate of the close. The question was, whether this agreement was good for seven years? *Lee*, C. J., and *Denison*, J., were of opinion that it was; observing, that in the case of *Webb v. Paternoster* (*y*), it was laid down that the grant of a licence to stack hay upon land did not amount to a lease of the land. And as the agreement in the present case was only for an easement and not for an interest in the land, it did not amount to a lease; and consequently, it was, not-

(*r*) *Lord Bolton v. Tomlin*, 5 A. & E. 856.

(*s*) *Hoby v. Roebuck*, 7 Taunt. 157. And see *Crowley v. Vitty*, 7 Exch. 319.

(*t*) *Donellan v. Read*, 3 B. & Ad. 899.

(*u*) Say. Rep. 3. A short note of this case, when it was first argued and adjourned, will be found in Serjt. Hill's

MSS. vol. 26, p. 287; and see Sugden's Law of Vendors and Purchasers, p. 99 (13th edit.).

(*x*) From a MS. note of this case, it appears that the consideration to be paid by the plaintiff for the liberty of stacking the coals, was 20*s.* for every stack.

(*y*) Palm. 71. See 13 M. & W. 846.

withstanding the statute, good for seven years. *Foster, J.*, concurred in opinion, that the agreement did not amount to a lease; but he inclined to be of opinion, that the words in the statute, "any uncertain interest in land," extended to it, and consequently that it was not good for more than three years. *Lee, C. J.*, and *Denison, J.*, were of opinion that these words related only to interests which are uncertain *as to the time of their duration*. After consideration, it was held, that the agreement, though by parol, was good for seven years. Whether the court were right in deciding that this particular agreement was not a lease has been doubted (z); it has been overruled, however, as to the other point, not on the ground that the agreement was for an interest in land, but because an easement cannot be created without deed (a). And it may be considered as settled, that a mere licence is not within either the first or fourth sections of the statute (b). But although an easement cannot be created by parol, an agreement for the sale of an interest in land, without a note in writing, may, nevertheless, operate as a *licence* until countermanded, so as to excuse the entry of the purchaser on land; it cannot, however, be made available in any way, as a contract (c). It may perhaps be safely laid down, that a parol contract, not being within the exception in the statute, will not create any interest in the land (d).

Shall have the Force and Effect of Leases at will ONLY—shall be void AT LAW (8 & 9 Vict. c. 106, s. 3). Notwithstanding these words, a lease by parol, for a longer term than three years, will, if followed by occupation and payment of rent (e), be evidence of a tenancy from year to year, subject to such of the terms of the parol lease as are applicable to such a tenancy. The tenant, on entry, is tenant at will, but is converted into a tenant from year to year on payment and acceptance of rent (f). In an action against a tenant for double rent, for holding over after the expiration of his term and a regular notice to quit, the first count in the declara-

(z) See 13 M. & W. 850; but see Sugd. Vend. & Pur. (13th edit.) 99.

(a) *Wood v. Leadbitter*, 13 M. & W. 838; *Hewlins v. Shippam*, 5 B. & C. 221; *Perry v. Fitzhove*, 8 Q. B. 757; *Raffey v. Henderson*, 17 Q. B. 574; *Wallis v. Harrison*, 4 M. & W. 538; *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824; *Thomas v. Fredericks*, 10 Q. B. 775; and see *Williams v. Morris*, 8 M. & W. 488.

(b) *Winter v. Brockwell*, 8 East, 310; *Rex v. Horndon*, 4 M. & S. 562; *Rex v. Standon*, 2 M. & S. 461; and see *Cocker v. Cooper*, 1 C. M. & R. 418, note (c), to *Coryton v. Lithby*, 2 Wms. Saund. 113, a.

(c) *Carrington v. Roots*, 2 M. & W. 248; *Wood v. Manley*, 11 A. & E. 34.

As to when a licence is or is not revocable, and as to "a licence coupled with an interest," see note (c) to *Coryton v. Lithby*, 2 Wms. Saund. 113, a.; *Adams v. Andrews*, 15 Q. B. 284; *Crosby v. Wadsworth*, 6 East, 602; *Perry v. Fitzhove*, 8 Q. B. 757; *Taplin v. Florence*, 10 C. B. 744.

(d) See *per Jervis, C. J.*, in *Taplin v. Florence*, 10 C. B. 762. See also *Tyler v. Bennett*, 5 A. & E. 377, as to a right to take water from a well, being an interest in land.

(e) See *per Pollock, C. B.*, 1 H. & N. 735.

(f) See note (a) to *Berrey v. Lindley*, 3 M. & G. 512, and notes to *Clayton v. Blakey*, 2 Sm. Lead. Ca. 88.

tion stated a holding under a certain term, determinable on the 12th of May then last past; and other counts stated a holding from year to year, determinable on the same day. It appeared in evidence, that the defendant had held the premises for two or three years, under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred. It was contended at the trial, that the holding should have been stated according to the legal operation of it, as a tenancy at will; and, as there was not any count adapted to that statement, the plaintiff ought to be nonsuited. *Rooke, J.*; however, considering that it amounted to a tenancy from year to year, overruled the objection, and the plaintiff obtained a verdict. On motion to set aside the verdict, on the ground of a misdirection, Lord *Kenyon, C. J.*, said, that the direction was right, for such holding now operates as a tenancy from year to year. The meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year (*g*). If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds, as to the duration of the term, the tenant holds under the terms of the lease, in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas (*h*). And if the landlord suffer the term to run out, the tenancy will expire at its end, without notice to quit (*i*). The effect of a demise exceeding three years, but not by deed, since 8 & 9 Vict. c. 106, s. 3, is the same as that of such a demise by word of mouth before that act, notwithstanding that the words are, "shall be void at law" (*k*). The way in which these words operate is, that the supposed contract between the parties is *per se* invalid, and that no action can be brought expressly upon it (*l*). But it has recently been held *in equity* that after part performance and entry, specific performance of such a contract may be decreed, and an injunction to restrain ejectment obtained (*m*). So also on entry and payment of rent a tenancy from year to year will be implied on such of the terms of the demise as are not inconsistent with such tenancy (*n*); and, if by writing, the written document may be used as evidence of those terms (*o*). It has been held, that an agreement to put and keep in repair (*p*), and a proviso for re-entry on non-payment

(*g*) *Clayton v. Blakey*, 8 T. R. 3; 2 Sm. Lead. Ca. 88, S. C.

(*h*) *Doe d. Rigge v. Bell*, 5 T. R. 471; 2 Sm. Lead. Ca. 84, S. C.; and see *De Medina v. Polson*, Holt, N. P. 47.

(*i*) *Tress v. Savage*, 4 E. & B. 36; *Doe d. Tilt v. Stratton*, 4 Bingh. 446; *Moffat v. Davenish*, 15 Q. B. 257; *Berrey v. Lindley*, 3 M. & G. 498; 4 Sc. N. R. 61.

(*k*) *Tress v. Savage*, 4 E. & B. 36.

(*l*) *Stretton v. Pettit*, 16 C. B. 420.

(*m*) *Parker v. Taswell*, 27 L. J., Chan. 812. See also *Fenner v. Hepburn*, 2 Y. & C. C. C. 159.

(*n*) See note (*a*), 3 M. & G. 512.

(*o*) *Tress v. Savage*, 4 E. & B. 36. See also *Lord Bolton v. Tomlin*, 5 A. & E. 856; and *Lee v. Smith*, 9 Exch. 662.

(*p*) *Beale v. Saunders*, 3 B. N. C. 850; *Arden v. Sullivan*, 14 Q. B. 833; *Richardson v. Gifford*, 1 A. & E. 52.

of rent (*g*), are such terms as will be so implied. The tenancy implied will always be determinable by six months' notice to quit, on either side (*r*), even where the parol agreement is for a tenancy until two years' notice to quit is given (*s*). An agreement to grant a future parol lease, though not exceeding three years from the agreement, is not within the exception in the second section (*t*).

3rd Section.—"And moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized *by writing*, or by act and operation of law." By 8 & 9 Vict. c. 106, s. 3, "An assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law, unless made by deed."

The mere cancelling, in fact, of a lease will not, since these enactments, operate as a surrender; nor will the production by the lessor of the cancelled instrument be *prima facie* evidence of the necessary deed or note in writing (*u*). A parol assignment of a lease from year to year is void (*v*), nor, as it appears, will a parol assignment of a term not exceeding three years, operate as an underlease (*x*). So a parol surrender of a lease (*y*).

Considerable doubt has prevailed, and may be said still to prevail, as to what does and what does not amount to a surrender "by act and operation of law" (*z*). Such surrender, it has been laid down, takes place "where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist" (*a*). The courts, however, have, as it will be seen, in some cases gone further than this, and held mere informal acts done with the intention of surrendering to amount to a surrender by operation of law (*b*). There is no doubt that acceptance of a new valid lease is a surrender of a former lease inconsistent therewith, and so of a voidable lease

(*g*) *Thomas v. Parker*, 1 H. & N. 669.
(*r*) *Tress v. Savage*, 4 E. & B. 36; *Doe v. Browne*, 8 East, 165.

(*s*) *Tooker v. Smith*, 1 H. & N. 732.

(*t*) *Sugd. Vend. & Pur.* (13th edit.) 99.

(*u*) *Roe d. Berkeley v. Abp. of York*, 6 East, 86; *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

(*v*) *Botting v. Martin*, 1 Campb. 318.

(*x*) *Barrett v. Rolph*, 14 M. & W. 348;

but see *Cottee v. Richardson*, 7 Exch. 143; *Pollock v. Stacey*, 9 Q. B. 1033.

(*y*) *Matthews v. Sarvell*, 8 Taunt. 270; 2 Moore, 262, S. C.

(*z*) See 2 Sm. Lead. Ca., notes to *Doe v. Oliver*.

(*a*) *Per Parke, B.*, in *Lyon v. Reed*, 13 M. & W. 306.

(*b*) See 9 C. B. 634, note (*a*).

known by both parties to be so (c); but the acceptance of a void lease (d), or of a voidable lease made void against the intention of the parties (e), or of a lease which does not pass the interest agreed upon, even though it contains an express surrender (f), or of an agreement for a lease (g), will not operate as a surrender by operation of law.

If the tenant gives up possession, and the landlord lets to a stranger with the former tenant's consent, this, according to the more recent decisions, will be a good surrender by operation of law, even where the tenancy was created by deed (h), or where it was freehold (i); and so, perhaps, if the tenant gives up, and the landlord takes actual possession of the premises (j). So where the tenant left the key at the counting-house of the landlord, who at first refused to accept it but afterwards put up a notice that the premises were to let, used the key to show them, and painted out the tenant's name, it was held a sufficient surrender (k). But a mere parol agreement between the landlord and the tenant without such change of possession, such as an arrangement to accept an insufficient notice to quit (l), or to reduce the rent (m), will not do. Nor is it enough that a new tenant is let in, unless with the consent of all the parties (n). It would seem, however, that if a tenant from year to year of premises gives them up to his landlord, in pursuance of a parol agreement to substitute a different tenement in place of that originally let, this would amount to a surrender by operation of law (o). Lord *St. Leonards* has expressed his disapprobation of the inroads which have been made on the Statute of Frauds on this head (p).

There cannot be a surrender to operate *in futuro* (q).

The statute 7 & 8 Vict. c. 76, ss. 3 and 4, regulates partitions, exchanges, assignments, leases, and surrenders, made between 31st December, 1844, and 1st October, 1845 (r).

(c) *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Fulmerston v. Steward*, Plowd. 106.

(d) *Bromley v. Stanley*, 4 Burr. 2210; *Roe v. Abp. of York*, 6 East, 86.

(e) *Doe d. Biddulph v. Poole*, 11 Q. B. 713.

(f) *Doe d. Lord Egremont v. Courtenay*, 11 Q. B. 702.

(g) *Foquet v. Moore*, 7 Exch. 870.

(h) *Nickells v. Atherstone*, 10 Q. B. 945; *Davidson v. Gent*, 1 H. & N. 749; *Thomas v. Cook*, 2 B. & A. 119; *Walker v. Richardson*, 2 M. & W. 882; but see *Lyon v. Reed*, 13 M. & W. 285; and *Creagh v. Blood*, 3 J. & Lat. 133.

(i) Lessee *Lynch v. Lynch*, 6 Ir. Law Rep. 131.

(j) *Dodd v. Acklom*, 7 Sc. N. R. 415; 6 M. & G. 672; *Grimmon v. Legge*, 8 B. & C. 324; *Smith v. Lovell*, 10 C. B. 7; but see *Morrison v. Chadwick*, 7 C. B.

265, and *Lyon v. Reed*, 13 M. & W. 285.

(k) *Phené v. Popplewell*, 12 C. B., N. S. 343.

(l) *Doe d. Huddleston v. Johnstone*, M'C. & Y. 141; *Johnstone v. Huddleston*, 4 B. & C. 922; *Mollett v. Brayne*, 2 Campb. 103.

(m) *Crowley v. Vitty*, 7 Exch. 319; but see *M'Donnell v. Pope*, 9 Hare, 705.

(n) *Matthews v. Sewell*, 8 Taunt. 270; *Graham v. Whickelo*, 1 C. & M. 188.

(o) *Per Willes, J.*, in *Giles v. Spencer*, 3 C. B., N. S. 251.

(p) In *Creagh v. Blood*, 3 J. & Lat. 132.

(q) *Doe d. Murrell v. Milward*, 3 M. & W. 332; *Weddall v. Capes*, 1 M. & W. 50; *Bessell v. Landsberg*, 7 Q. B. 638.

(r) As to the construction of this Act, see *Burton v. Revell*, 16 M. & W. 307;

II. *Fourth and Seventeenth Sections as to Agreements, &c., and the Sale of Goods.*

On the Effect of Parol Evidence of a Variation or Waiver of a Written Agreement.

4th Section.—"No action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; or to charge any person, upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party *to be charged* therewith, or some other person thereunto by him lawfully authorized." This section was intended for the relief of personal representatives and others, and it was not thereby intended that they should be charged further or otherwise than by common law they were chargeable. Before the statute, a promise made, with reference to any of the subjects mentioned in this section, would not have made the party promising liable, unless such promise had been founded on a sufficient consideration(s). The same obtains, since the statute, with an addition, as to the appearance of the consideration on the face of the writing to be more fully explained at a subsequent page (t).

No Action shall be brought.—It does not appear to be quite settled, whether the effect of these words is to render the contracts mentioned in the fourth section altogether void, as in the seventeenth, or whether it is merely to prohibit their being enforced by action. The Court of Exchequer has maintained the former construction (u), the Court of Common Pleas the latter (x). The better opinion would seem to be that of the Common Pleas, which has decided that an oral contract within the fourth section made abroad cannot be enforced here (y).

If an action is brought for the non-performance of the promise, it is not necessary that it should be stated in the declaration that

Arden v. Sullivan, 14 Q. B. 833; *per Maule, J.*, 16 C. B., 432; *Doe d. Davernish v. Moffat*, 15 Q. B. 257.

(s) *Barrell v. Trussell*, 4 Taunt. 117; *French v. French*, 2 M. & G. 644; 3 Sc. N. R. 121; *Sykes v. Dixon*, 9 A. & E. 693.

(t) *Post*, p. 788.

(u) *Carrington v. Roots*, 2 M. & W. 248; *Reade v. Lamb*, 6 Exch. 130.

(x) *Leroux v. Brown*, 12 C. B. 801; 22 L. J., C. P. 1; *Laythorp v. Briant*, 2 B. N. C. 735; 3 Scott, 238; and see *Crosby v. Wadsworth*, 6 East, 602; *Shippey v. Denison*, 5 Esp. 190; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Cocking v. Ward*, 1 C. B. 859; *per Bayley, J.*, in *Brecegirdle v. Heald*, 1 B. & A. 727.

(y) *Leroux v. Brown*, 12 C. B. 801.

the agreement was in writing (z); it will be sufficient for the plaintiff on a plea putting the promise in issue, to produce a written agreement in evidence at the trial; if the pleadings are such as to admit the promise, this will of course be unnecessary (a). The objection, that there is no contract in writing, need not be pleaded specially, but may be set up under *non assumpsit* (b). The word "action," duly interpreted, embraces every suit in equity (c). The preceding remarks apply to each of the clauses in this section, and they are introduced in this place for the sake of avoiding repetition.

To charge any Executor or Administrator, upon any special Promise to answer Damages out of his own Estate.—The leading case on this clause is that of *Rann v. Hughes* (d). It was stated in the declaration, "that disputes had arisen between the testatrix and the intestate, which had been referred to arbitration; that the arbitrator awarded, that the intestate should pay to the testatrix a sum of money on a day appointed; that afterwards the intestate died, possessed of effects sufficient to pay the sum awarded; that at the time of the death of the testatrix, the sum awarded remained unpaid, by reason of which the defendant, as administratrix, became liable to pay the plaintiffs, as executors, the said sum, and, being so liable, the defendant (not saying as administratrix), in consideration thereof, promised to pay the same." Pleas.—1. *Non assumpsit*. 2. *Plene administravit*. 3. An outstanding debt, on bond, and *plene administravit præter*. The replication took issue on all the pleas. Verdict for the plaintiffs on the first issue, and damages assessed: on the other issues, for the defendant. The plaintiffs entered judgment for the damages assessed and costs, against the defendant *generally*. On a writ of error in the Exchequer Chamber, it was assigned for error, that the defendant was impeached as administratrix of the intestate, yet judgment was given against her *generally*, and without any regard to her having goods of the intestate in her hands to be administered. The Court of Exchequer Chamber reversed the judgment. Upon a writ of error from this judgment, in the House of Lords, the following question was put to the judges: Whether sufficient matter appeared upon the declaration to warrant, after verdict, the judgment entered up against the defendant in error in her personal capacity. *Skynner*, C. B., delivered the unanimous opinion of the judges:—

(z) *Anon.*, Salk. 519; 1 Wms. Saund. 211, c. note (l); *Ibid.* 277, b. Where also a distinction in this respect between a declaration and a plea is mentioned; see also *Case v. Barber*, T. Raym. 450; and *Foquet v. Moor*, 7 Exch. 870.

(a) *Middleton v. Brewer*, Peake, 15.

(b) *Eastwood v. Kenyon*, 11 A. & E. 438; *Buttermere v. Hayes*, 5 M. & W.

456; *Fricker v. Thomlinson*, 1 M. & Gr. 772; *Leaf v. Tutor*, 10 M. & W. 393; *Reade v. Lamb*, 6 Exch. 130.

(c) *Per Lord Eldon*, C., *Cooth v. Jackson*, 6 Ves. 31.

(d) *Rann v. Hughes*, D. P. 14 May, 1778; 4 Bro. P. C. p. 27, Tomlins' ed.; 7 T. R. 350, n.

1. That there was not a sufficient consideration to support this demand, as a personal demand against the defendant: inasmuch as the defendant did not derive any advantage from the promise, for it was a promise generally to pay upon request what she was liable to pay upon request in another right, and the promise was not founded on any consideration of forbearance, or the like, which might have supported it. 2. That the promise not being founded on any consideration, the circumstance of its being in writing (which might be presumed after verdict) would not assist the case; for, by the law of England, an agreement merely written, and not being a specialty, required a consideration. 3. That the Statute of Frauds had not taken away the necessity of a consideration; for that statute was made for the relief of personal representatives; and did not intend to charge them further than by common law they were chargeable.

Or to charge the Defendant upon any special Promise to answer for the Debt, Default, or Miscarriage of another Person.—In order to bring a case within this clause of the statute, it is essentially necessary that the person, on whose behalf the promise is made, should be liable, as well as and concurrently with the promiser; or, as it is sometimes expressed (though the propriety of the expression has been questioned)(e), that the promise should be collateral, and not original. This distinction will be illustrated by the following cases, which are arranged under two divisions; first, cases within the statute; secondly, cases not within the statute.

1. *Cases within the 2nd Clause of the 4th Section.*—In an action of assumpsit, the plaintiff declared that the defendant, in consideration that the plaintiff would let his gelding out to hire to J. S., promised the plaintiff that J. S. should re-deliver the gelding, but that J. S. never did re-deliver him. It was objected, that the plaintiff had not any remedy against the party upon the contract, for not re-delivering the gelding, except by an action of trover upon the subsequent tort, in case of demand and refusal; and, therefore, as such remedy accrued from a wrong, subsequent to the contract, the present case was not within the meaning of the statute; but the court overruled the objection, observing, that the party was also liable in detinue upon the original delivery or bailment, the bailment having been such as in its nature required a re-delivery; and if the bailee will not re-deliver the thing bailed, the only adequate remedy is an action of detinue against the bailee; consequently, this promise of the defendant's, that J. S. should re-deliver the horse bailed, for which there was a remedy against J. S. upon the bailment, was a collateral promise, and therefore a promise to answer for the act and default of another,

(e) See Bull. N. P. 281.

within the statute (*f*). A. had wrongfully, and without the licence of B., ridden his horse, and thereby caused his death; it was held, that a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A., is a collateral promise within the Statute of Frauds, and must be in writing (*g*). The defendant, in consideration that the plaintiff would not sue J. S., promised to pay the plaintiff the money due from J. S.: this was held to be within the statute, for there was not any consideration stated for which the plaintiff had promised not to sue; and if there had been any, J. S. could not have availed himself of this agreement between the defendant and plaintiff, but the debt would still have subsisted, and consequently, the promise was collateral (*h*). J. S. was indebted to the plaintiff in a sum of money, for the recovery of which the plaintiff had commenced an action; whereupon the defendant, in consideration that the plaintiff would stay his action against J. S., promised to pay the plaintiff the money owing to him by J. S. This was held to be clearly within the statute, on the ground that there was a debt of another still subsisting, and a promise to pay it (*i*). So also an agreement to relinquish a claim to lien on property in consideration of a guarantee by the defendant of the amount due in respect of the lien by the owner of the property (*j*). It is clear that a promise is equally within the statute, whether it be to answer for an *existing* or *future* debt, default, or miscarriage (*k*), although a contrary opinion formerly prevailed (*l*). Where a *capias* had been issued against a person and another entered into a bail bond for him, in consideration of which a third person made a verbal promise to indemnify him against the consequences, it was held, that the case came within the above section (*m*); but where a person at the request of another and upon a promise of indemnity entered into a recognizance of bail for the appearance of a third to answer a criminal charge, it was held that this was not a promise within the section, since no debt or legal duty was owing from the accused to his bail in consequence of his having become bail (*n*).

So where a judgment having been recovered against A. in a county court for 34*l.*, he was arrested by the bailiff (the plaintiff), and the creditor authorized the bailiff to accept 17*l.* upon the defendant promising the bailiff that if he would release him he would produce him on a day named or pay the 17*l.*, this was held

(*f*) *Buckmyr v. Darnell*, Lord Raym. 1058; Salk. 27 B. R.; 6 Mod. 248; 1 Sm. Lead. Ca. 224, S. C.

(*g*) *Kirkham v. Marter*, 2 B. & A. 613.

(*h*) *Rothery v. Curry*, Bull. N. P. 281.

(*i*) *Fish v. Hutchinson*, 2 Wils. 94.

(*j*) *Gull v. Lindsay*, 4 Exch. 45; but see *Castling v. Aubert*, 2 East, 324; *Houlditch v. Milne*, 3 Esp. 87; *Walker*

v. Taylor, 6 C. & P. 752, and *post*, p. 775.

(*k*) *Jones v. Cooper*, Cowp. 227; *Thomas v. Williams*, 10 B. & C. 664; *Barber v. Fox*, 1 Stark. 270.

(*l*) *Mawbrey v. Cunningham*, cited in Cowp. 228.

(*m*) *Green v. Creswell*, 10 A. & E. 453.

(*n*) *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J., Q. B. 381, in error.

not to be a promise to answer for the debt or default of another within the statute, but an original promise to pay the plaintiff 17*l.* or surrender A. (o).

In an action for goods sold and delivered, it appeared in evidence, that the goods in question had been delivered to J. S. in consequence of a *parol* promise by the defendant to the plaintiff in these words, "*I will pay you, if J. S. will not.*" J. S. was entered as the debtor in the plaintiff's books. The court were of opinion, that this promise by the defendant was a collateral undertaking within the statute (p). The defendant had asked M. (one of the plaintiffs,) whether he was willing to serve J. S. with goods? M. answered, that he did not know J. S.; to which the defendant replied, "*If you do not know him, you know me, and I will see you paid.*" M. then said, he would serve him; to which the defendant answered, "*He is a good chap; but I will see you paid.*" A letter was afterwards received by the plaintiffs from J. S. containing an order for certain goods, which were afterwards sent to him. The plaintiffs made J. S. the debtor for these goods in their books; J. S. having refused to pay for the goods, an action for goods sold and delivered was brought against the defendant. The court held, that the case was within the statute, there not having been any promise in writing, and gave judgment for the defendant; Buller, J., observing, that the general rule now was, that *if the person for whose use the goods are furnished be liable, any other promise by a third person to pay that debt must be in writing* (q).

The plaintiff, a woollen-draper, in London, employed a rider to receive orders from his customers in the country. The defendant, meeting with the rider at Deal, desired him to write to the plaintiff, to request him to supply the defendant's son (who traded in the West Indies), with whatever goods he might want, *on his, the defendant's credit*; and at the same time said, "*Use my son well; charge him as low as possible, and I will be bound for the payment of the money, as far as 800*l.* or 1,000*l.**" The rider accordingly wrote to the plaintiff the following letter: "Mr. Hayman of this town says, his son will call on you, and leave orders; and he has promised me to see you paid, if it amounts to 1,000*l.* N.B. If deal for twelve months' credit, and pay in six or eight months, expects discount in proportion." Soon after the son received goods from the plaintiff to the amount of 800*l.*, which were delivered to him in consequence of the before-mentioned engagement of the father. *The son was debited in the plaintiff's books*, and having been applied to for payment, wrote the following answer to the plaintiff: "In answer to your letter, I can only say, that I

(o) *Reader v. Kingham*, 13 C. B., N. S. 344; 32 L. J., C. P. 108.

(p) *Jones v. Cooper*, Cowp. 227.

(q) *Matson v. Wharam*, 2 T. R. 80.

understand your credit for the goods was twelve months, which was also mentioned by your rider to my father: I shall, at this rate, make you remittances for the different parcels as they become due." The son afterwards became a bankrupt; and this action was brought against the father, to recover the value of the goods. *Heath, J.*, (who tried the cause,) directed the jury to consider whether the plaintiff gave credit to the defendant *alone*, or to him *together with his son*; that in the former case they should find a verdict for the plaintiff; in the latter for the defendant; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the statute. A verdict was found for the defendant, and a rule obtained to set it aside; which the court afterwards discharged, being clearly of opinion, that this promise, not being in writing, was void by the statute, as it appeared from the letter of Hayman, the son, that credit was given to him as well as to the defendant (*r*). The plaintiff had contracted to supply goods to C. and Co. to be paid for in cash on each delivery. C. and Co. being desirous of obtaining the goods at a month's credit, the defendant promised the plaintiff that if he would supply the goods to C. and Co., drawing upon them at one month, and would allow him 3 per cent. upon the amount of the invoice, he would pay the plaintiff cash, and take C. and Co.'s bill "without recourse," in other words, buy the bill of him. Held, that this was a contract to answer for the debt of another within the statute (*s*).

Where a parol agreement is entered into for the payment of the debt, or part of the debt, of another person, and also for the performance of some other act, the promise to perform which would not of itself be required to be in writing, an action cannot be maintained on such agreement; because the agreement being entire, it is incapable of separation, so as to enable the plaintiff to recover on one part alone (*t*). *J. S.* being indebted to several persons, and among others to the plaintiff, (who had incurred considerable expenses in law proceedings against *J. S.* for the recovery of his debt,) and a proposal having been made, at a meeting of the creditors, that they should receive a composition of 10s. in the pound; all the creditors consented to take it except the plaintiff, who refused to consent, unless the law expenses before mentioned were also paid; whereupon the defendant promised to pay those expenses, and to accept bills drawn by the plaintiff on him to the amount of the composition. The plaintiff accordingly drew bills

(*r*) *Anderson v. Hayman*, 1 H. Bl. 120; and see *Peckham v. Faria*, 3 Doug. 13.

(*s*) *Mallet v. Bateman*, 1 L. R., C. P. 163, in error; 35 L. J., C. P. 40.

(*t*) *Lexington v. Clarke*, 2 Ventr. 223; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664; and see

Mechelen v. Wallace, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766; *Harman v. Reeve*, 18 C. B. 587; *Cooke v. Toombs*, 2 Ans. 420; *Lea v. Barber*, *ibid.* 425; *Corder v. Drakeford*, 3 Taunt. 382; *Neal v. Viney*, 1 Campb. 471; *Lord Falmouth v. Thomas*, 1 C. & M. 89; and *post*, p. 784.

on the defendant to that amount, which he accepted and paid; but the defendant having refused to pay the law expenses, the plaintiff brought an action against him on the agreement: it was held, that the agreement *being by parol*, the plaintiff could not recover; for, though the agreement was to do something beyond payment of part of the debt of another, yet, being entire, the plaintiff could not separate it, and recover on one part only (*u*). Where a defendant, having, before Lord *Tenterden's* Act, entered into a guarantee in writing, and become liable upon it, at a period of more than six years before the commencement of suit, verbally promised within six years that the matter should be arranged, and afterwards, upon an action being brought, pleaded *actio non accrevit*, &c.; it was held, that the Statute of Frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the Statute of Limitations, that the latter promise should also be in writing (*v*).

In order to decide whether the promise of the defendant was an original or a collateral one, it is often necessary and allowable to give evidence of the position of the parties, and of the several circumstances under which the words in question were spoken or written (*x*). "Whether the contract was original or collateral," says Mr. Justice *Bayley*, "*viz.*, whether it was binding on the parties to pay in the first instance, and at all events, or only binding in case the other does not, will depend on the contract between the parties. I think the expressions, 'I'll be answerable,' and 'I'll see you paid,' are equivocal expressions. And then we ought to look to the circumstances to see what the contract between the parties was" (*y*). The entry of the debt in the plaintiff's books, and the bill sent in, afford strong, though not conclusive, evidence on this point (*z*); and in some cases the subsequent acts and expressions of the parties have been received as admissions of the nature of the antecedent contract (*a*).

2. *Cases not within the 2nd Clause of the 4th Section.*—An action having been brought against the defendant, an attorney, and two others, for appearing for the plaintiff without a warrant, the record was carried down to be tried at the assizes when the defendant promised, in consideration that the plaintiff would not further prosecute the action, defendant would pay 10*l.* and costs of suit. In an action on this promise, the question was, whether this was a promise within the statute; and it was held, that it was not;

(*u*) *Chater v. Beckett*, 7 T. R. 201.

(*v*) *Gibbons v. M'Casland*, 1 B. & A. 690.

(*x*) *Keate v. Temple*, 1 B. & P. 158; *Simpson v. Penton*, 2 C. & M. 430; *Bainbridge v. Wade*, 16 Q. B. 89.

(*y*) In *Simpson v. Penton*, 2 C. & M.

433.

(*z*) *Storr v. Scott*, 6 C. & P. 241; *Simpson v. Penton*, 2 C. & M. 430.

(*a*) *Rains v. Storry*, 3 C. & P. 130; *Darnell v. Pratt*, 2 C. & P. 82; *Croft v. Smallwood*, 1 Esp. 121.

as not being a promise to pay the debt of another, but to pay the party's own debt (b). In *Read v. Nash* (1 Wils. 305. See 1 Wms. Saund. 211, c. note (l)), A., the plaintiff's testator, brought an action of assault and battery against J. S.; the cause being at issue, the record entered, and just coming on to be tried, the defendant, in consideration that A. would withdraw the record, promised to pay him a sum of money, and the costs to that time; whereupon A. withdrew his record; A. died: the plaintiff, his executor, brought this action upon the special promise of defendant. The defendant pleaded (c) the Statute of Frauds, viz. that there was not any agreement in writing, touching the promise. On demurrer, the court gave judgment for the plaintiff; being of opinion, that this promise was not within the statute; that it was an original promise sufficient to found an *assumpsit* against the defendant; that J. S. was not a debtor; the cause was not tried; it did not appear that J. S. had been guilty of any default or miscarriage; there might have been a verdict for him, if the cause had been tried; J. S. never was liable to the particular debt, damages, or costs; that the true difference was between an original promise, and a collateral promise; the former promise was not within the statute, the latter was. Conversely, where the defendant in a Chancery suit, in consideration of the suit being discontinued, with the consent of the plaintiffs in Chancery, promised their attorney to pay the costs due to him, the promise was held to be within the statute, because the plaintiffs were liable to their attorney for those costs, and the defendant could only become liable for costs to the plaintiffs themselves and on the termination of the suit (d).

In an action of *indebitatus assumpsit*, for money laid out to the use of defendant by the plaintiff, at the request of the defendant, the evidence was that one D. coming to the plaintiff, by the defendant's order, for money to pay some workmen who had been employed in the garden of J. S., the infant grandson of defendant, the plaintiff refused to pay the money unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz.—“This is to certify, that it is my request that you pay to Mr. D., on the account of J. S., for the workmen's use, the sum of £ ;” signed by the defendant. It was objected, that this was evidence only of a collateral security, and not of a debt from the defendant. But *per Cur.*, the money was manifestly advanced on the defendant's credit; and its being on account of the defendant's grandson, an infant, is a matter merely between the defendant and the infant. The defendant is the debtor to the plaintiff; the objection arises from an ambiguous use of the term *collateral* promise; by which the defendant must mean a special undertaking upon a special contingency; as, if such a one does not pay, I will. It is

(b) *Stephens v. Squire*, 5 Mod. 205.

(c) See *ante*, p. 766.

(d) *Tomlinson v. Gell*, 6 A. & E. 564.

also applied to a joint undertaking, which is joint and several, and it is called collateral as between the two debtors, but it is original in each of them as to the creditor; so in this case, there is an original undertaking by the defendant, though, perhaps, she may undertake this as a security for her grandson, as between him and her. The defendant is the only original debtor; for the infant never could be liable (*e*). Where the transaction effectuates a transfer of the debt from the original debtor to the defendant, so that the original debtor is thereby entirely discharged from further liability, and the debt is taken by the defendant upon himself, the agreement need not be in writing; it being, in general, essential, in order to bring a case within the fourth section, that both should be liable at the same time. Therefore, where the plaintiff, having issued a *fi. fa.* against L., was induced to withdraw it on the defendant's undertaking to pay the amount of the judgment against L., and L. making a conveyance of all his property to the defendant, it was held, that the defendant's undertaking was not within the Statute of Frauds, inasmuch as the effect of the transaction was to release L. from all further liability (*f*). So where a defendant, in custody on a *ca. sa.*, is discharged by consent of the execution creditor, the debt is extinguished; and therefore, a promise by a third person to pay that debt on condition of that discharge, is an original promise and not within the statute (*g*). So also an agreement to convert a separate debt into a joint one extinguishes the separate debt, and is not within the statute (*h*). For a similar reason, a transfer of the interest in a debt from the creditor to a third person, is not within the statute, provided the transaction is such as to extinguish the claim of the original creditor (*i*). Where, however, the bargain is, not for extinguishment of the debt, but, for forbearance, giving time, further security, or the like, the statute applies (*j*).

There is, however, a remarkable class of cases in which a promise to answer for the debt of another having been coupled with the purchase by the guarantor of an interest of some kind, or the surrender in his favour of a right such as that of distress, has been held not to be within the statute: and in these cases it is not essential that the original debt should be extinguished (*k*). The principle on which these cases depend appears to be, that the main object of the transaction has been to effect something entirely distinct from the payment of the debt of the third person, and that such payment, though a consequence, is not yet the direct object of the trans-

(*e*) *Harris v. Huntbach*, 1 Burr. 373, and MSS.

(*f*) *Bird v. Gammon*, 3 B. N. C. 883; and see *Gaunt v. Hill*, 1 Stark. 10.

(*g*) *Goodman v. Chase*, 1 B. & A. 297; *Butcher v. Stewart*, 11 M. & W. 857; and see *Lane v. Burghart*, 1 Q. B. 933.

(*h*) *Exp. Lane*, 1 De Gex, 300.

(*i*) *Anstey v. Marden*, 1 N. R. 124; *Hodgson v. Anderson*, 3 B. & C. 842.

(*j*) *King v. Wilson*, 2 Str. 873; *Fish v. Hutchinson*, 2 Wils. 94; *French v. French*, 2 M. & G. 644; 3 Sc. N. R. 126.

(*k*) See *per Parke, B.*, in *Andrews v. Smith*, 2 C. M. & R. 631.

action (*l*). The leading case of these is *Williams v. Leper* (*m*): there A., being indebted to the plaintiff for the rent of a dwelling-house, in arrear for three quarters of a year, and becoming insolvent, made a bill of sale of all his goods in the house, to the defendant Leper, in trust, to be sold by him as broker, for the benefit of A.'s creditors; defendant accordingly advertised a sale: on the morning of the sale, and while the defendant was in possession of the goods upon the premises, the plaintiff (the landlord) came there to distrain for his rent; whereupon the defendant, in consideration that the plaintiff would not distrain, promised to pay the plaintiff the rent in arrear. Upon this promise of the defendant an action was brought, and the question was, whether the promise was within the statute. It was held, that it was not; but upon what precise ground the decision proceeded it is difficult to collect from the reports. Lord *Mansfield*, C. J., and *Wilmot*, J., seemed to have formed their opinion on a supposition that the plaintiff had actually distrained, and was in possession of the goods at the time the promise was made; but the fact was, that the plaintiff was not in possession (*n*), but had merely given notice to distrain. *Yates*, J., seems to have thought that the defendant derived an advantage from the plaintiff's permitting him to proceed with the sale of the goods; and that this was an original consideration to the defendant. *Aston*, J., considered the goods as the only debtor; consequently, that the promise was not a promise to pay the debt of the tenant. "And it is submitted," says Mr. Justice *Williams*, "that this is the true ground of the decision, and that if the defendant had not been the owner of the goods, the promise must have been in writing" (*o*). It will be observed, that, although there was no actual distress, yet there was a power of immediate distress, and an intention to enforce it; it should seem, therefore, that the judges must have considered that power as equivalent to an actual distress; and the promise extended only to the amount of the arrears and rent then due, and for which the right of distress might have been immediately exercised (*p*). And a subsequent case, where the defendant had been simply employed to sell the goods, but had taken no assignment of them, and the landlord had only threatened a distress, was decided in accordance with, and upon the authority of, the foregoing (*q*). In another case, it was held, that, where plaintiff having actually distrained for rent in arrear goods, which the tenant was at that time about to sell, agreed with defendants to deliver up the goods, and to permit them to be sold by one of the defendants for the tenant upon defendant's joint under-

(*l*) See judgments in *Couturier v. Hastie*, 8 Exch. 56, and in *Thomas v. Williams*, 10 B. & C. 670; *per Parke*, B., in *Macrory v. Scott*, 5 Exch. 914.

(*m*) 2 Wils. 308; 3 Burr. 1886.

(*n*) See 2 Wils. 308, and 2 East, 330.

(*o*) In note (*l*) to *Forth v. Stanton*, 1

Wms. Saund. 211, d.

(*p*) See 10 B. & C. 670, and 1 Wms. Saund. 211, e, note (*l*).

(*q*) *Bampton v. Paulin*, 4 Bingh. 264; and see *Barrell v. Trussell*, 4 Taunt. 117.

taking to pay to plaintiff all such rent as should appear to be due to him from the tenant, the agreement was not within the statute^(r). But where the promise was to pay the arrears of rent then due, and also the accruing rent up to a future day, and this promise was by word only; it was held that the promise to pay the accruing rent exceeded the consideration, and could not be sustained on the ground on which former cases had been sustained, and was nothing more than a promise to pay money that would become due from a third person^(s); and consequently, being within the mischief intended to be remedied by the statute, was void; and being void in part, could not be held good as to the other part^(t).

The most difficult cases to reconcile with the other authorities seem to be those relating to liens. An action was brought for repair by the plaintiff of a carriage belonging to a third person, which had been sent to the former by the defendant. The defendant directed the plaintiff to pack and send the carriage on board ship. Upon the plaintiff's enquiring who was to pay, the defendant said he had sent the carriage, and he would pay for the repairs. Lord *Eldon*, C. J., held that, as the plaintiff had to a certain extent a *lien* on the carriage, and parted with it on defendant's promise to pay, the case was not within the statute^(u). It has been suggested that the true ground of the decision may have been that the carriage was sent by the defendant, and the work done on his order, and consequently, that no third person was liable at all for the work so done^(x). To a more recent case^(y) this explanation will not apply, and it would seem that these decisions are overruled by *Gull v. Lindsay* ^(z), cited *ante*, p. 768. In *Castling v. Aubert* ^(a), the plaintiff, who was the broker of J. S., having policies of assurance of great value in his hands, belonging to J. S., accepted several bills for the accommodation of J. S. A loss having happened on the policies, which the underwriters had agreed to pay, but which J. S. could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands J. S. had at that time transferred the management of his insurance concerns. Some of the plaintiff's acceptances being then outstanding (and particularly an acceptance on a bill in the hands of J. N.), upon which writs had been sued out (though not then executed) against J. S. as drawer, and the plaintiff as executor, the plaintiff refused to deliver up the policies, they being the only securities he had against his acceptances, without an indemnity; whereupon it was

(r) *Edwards v. Kelly*, 6 M. & S. 204.

(s) *Thomas v. Williams*, 10 B. & C. 664.

(t) See *ante*, p. 770, note (s).

(u) *Houlditch v. Milne*, 3 Esp. 86.

(x) 1 Wms. Saund. 211, d.

(y) *Walker v. Taylor*, 6 C. & P. 752.

(z) 4 Exch. 45.

(u) 2 East, 325, cited by *Parke*, B., in *Andrews v. Smith*, 2 Cr. M. & R. 631, as an exception to the general rule that the undertaking is collateral, wherever there is an original debt.

verbally agreed between plaintiff, defendant, and J. S., that the defendant, upon the policies being made over to him, should pay the amount of the bill in the hands of J. N., with the costs incurred, and should lodge money in a banker's hands for the satisfaction of the remainder of the acceptances as they became due. In pursuance of this agreement, the defendant paid into the banker's hands the sum agreed on, and the plaintiff delivered up the policies to the defendant. The defendant received from the underwriters the amount of their subscriptions, far exceeding the sum in dispute; but refused to pay the debt and costs on the bill in J. N.'s hands; in consequence of which refusal the plaintiff was arrested at the suit of J. N. Upon this the plaintiff brought an action against the defendant, declaring upon the special agreement, and also for money had and received. The question was, whether the promise of the defendant to pay the sum due from J. S. for the debt and costs, on having the policies of insurance delivered to him, was within the statute? The court were of opinion that it was not; *Lawrence, J.*, observing, "this was to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It was not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing it." And *per Le Blanc, J.*, "This is a case where one man, having a fund in his hands, which was adequate to the discharge of certain incumbrances, another party undertook, that if the fund were delivered up to him, he would take it with the incumbrances; this, therefore, has not any relation to the Statute of Frauds" (b).

On the same principle as that on which the class of cases commencing with *Williams v. Leper* (c), may be explained, as before suggested, *viz.* that the principal object of the transaction is to be regarded, it has been held, that a retainer of an agent to dispose of goods under a *del credere* commission need not be accepted in writing by the agent (d). The plaintiffs, in an action of assumpsit, sued the defendants on default by the purchaser of a cargo of Indian corn, which had been sold by the defendants on behalf of the plaintiffs under a *del credere* commission, and it was objected, on behalf of the defendants, that they were not liable, inasmuch as there was no note in writing signed by them. But after disposing of other points not necessary to mention here, *Parke, B.*, in delivering the judgment of the Court of Exchequer, said:—"The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a per cent-

(b) See, also, *Anstey v. Marden*, 1 N. R. 124, cited *ante*, p. 773.

(c) *Ante*, p. 774.

(d) *Couturier v. Hastie*, 8 Exch. 40.

age guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given; and the case resembles in this respect those of *Williams v. Leper* (e), and *Castling v. Aubert* (f). We entirely adopt the reasoning of an American judge (Mr. Justice Cowen), in a very able judgment on this very point in *Wolff v. Koppel* (g). We are therefore of opinion that the rule should be absolute to enter a verdict for the plaintiffs" (h).

From the reasoning in the above judgment may be deduced the true limits to an opinion which appears at one time to have prevailed (i) that a contract, if founded on a new consideration, is not within the statute. Now, it is plain that a promise to pay the debt of another, founded on the antecedent debt alone, is *nudum pactum* (k); and therefore, wherever such contract is to answer for an old debt, there must be a new consideration. It may, perhaps, therefore, be safely laid down that wherever the principal object of the transaction is to secure the debt of another, as in the case of an advance to A. on the guarantee of B., the case will be within the statute; and that the only cases in which the nature of the consideration is material are such as those in the class above mentioned, in which the guarantee is only a secondary matter.

A promise to a *debtor* to pay his debt to a third person, is not a promise to answer for the debt of another within this section, which applies only to promises made to the person, to whom another is answerable (l). In order to be within the statute, it must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee* (m).

The declaration on a promise within this branch of the fourth section must be special, and consequently the price of goods sold

(e) *Ante*, p. 774.

(f) *Ante*, p. 775.

(g) 5 Hill, N. Y. Rep. 458, cited 8 Exch. 56. note (c).

(h) 8 Exch. 55.

(i) See 1 Wms. Saund. 211, a.; *Thomas v. Williams*, 10 B. & C. 664.

(k) See *French v. French*, 2 M. & G. 644; 3 Sc. N. R. 121, S. C.

(l) *Eastwood v. Kenyon*, 11 A. & E. 438.

(m) *Per Parke, B.*, in *Hargreaves v. Parsons*, 13 M. & W. 570.

to A., and guaranteed by B., cannot be recovered against B. under the common counts (*n*).

Or to charge any Person upon any Agreement made in Consideration of Marriage.—It is now settled, notwithstanding former decisions to the contrary (*o*), that this clause does not extend to mutual promises to marry; consequently, such promises are binding, although they are not reduced into writing and signed by the party. The plaintiff declared, that in consideration of her having promised to marry the defendant, he promised to marry her at his father's death; and averred, that the father was dead, but the defendant had refused to marry plaintiff, and had since married A. B. On non-assumpsit pleaded, and verdict for plaintiff, it was moved, in arrest of judgment, that this parol promise was not good in law. But (after argument) it was held, that the case was not within the statute; for that this clause in the statute related only to contracts in consideration of marriage; and the defendant, having married another person, had disabled himself from performing the promise; the plaintiff, therefore, could not apply to the spiritual court to have a performance decreed, and consequently was entitled to a compensation in damages (*p*). The effect of the statute is, that a contract to settle property, or the like, in consideration of marriage, cannot be enforced unless evidenced by writing. But a parol antenuptial contract acknowledged by writing after the marriage will be valid against the contractor (*q*), and any settlement made in pursuance of such contract will be supported as a voluntary settlement (*r*). In equity, if there has been a part performance of the contract besides the marriage, the contract will be enforced (*s*), but it is quite clear that marriage alone is not such part performance as will take the case out of the statute (*t*). Nor will part performance by the party to be charged be sufficient (*u*). Where a father, before the marriage of his daughter, agreed with the intended husband to settle landed property, and the husband was let into possession, and expended money on it after the marriage, the contract was enforced against the representatives of the father. "This," said Lord Justice *Knight Bruce*, "is a clear case of a parol agree-

(*n*) *Mines v. Sculthorpe*, 2 Camp. 215. See 1 Wms. Saund. 211, c.

(*o*) *Philpott v. Walleth*, 3 Lev. 65; Freem. 541.

(*p*) *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, Ld. Raym. 386; *S. P. per Ward*, C. B., Carth. 467, 468.

(*q*) *Hammersley v. De Beil*, 12 Cl. & F. 45; 3 Beav. 469; *Dundas v. Duntens*, 1 Ves. jun. 196; 2 Cox, 235; *Randall v. Morgan*, 12 Ves. 67; *Shaw v. Jakeman*, 4 East, 201; *Mountacue v. Macarwell*, 1 Str. 236.

(*r*) *Warden v. Jones*, 26 L. J., Chan.

427; 27 L. J., Chan. 19, S. C.; *Spurgeon v. Collier*, 1 Eden, 55.

(*s*) *Surcombe v. Pinniger*, 3 De G. M. & G. 571, 574; and see *Hammersley v. De Beil*, 12 Cl. & F. 45; *Stroughill v. Gulliver*, 4 W. R. 684.

(*t*) *Lassence v. Tierney*, 1 McN. & G. 551; 2 Hall & T. 115, S. C.; judgment in *Warden v. Jones*, 6 W. R. 182; and see *Taylor v. Beech*, 1 Ves. sen. 297; and *Jorden v. Money*, 5 H. L. C. 185.

(*u*) *Cator v. Cator*, 1 L. R., Ch. App. 137; 35 L. J., 292 Ch.

ment for valuable consideration which has been in part performed, and it is the settled law of this country, and has been for a great number of years, that in such circumstances the Statute of Frauds is no defence" (v). But since, as has been said, a parol contract followed by the marriage and no other act of part performance will not be enforced, it will follow that any settlement made in pursuance of such contract is voluntary as above mentioned, and will not hold as against prior existing creditors of the husband (x).

Or upon any Contract or Sale of Lands, &c. or any Interest in or concerning them.—This branch of the section applies, not only to contracts for the sale of lands, &c., but also to leases, whether to commence *in presenti* or *in futuro*, and to agreements for leases (y), and assignments (z). Its effect, in respect to leases, as already remarked (a), is to preclude the maintenance of any action for not taking possession in pursuance of a parol demise, even though valid under the second section. A contract to let furnished lodgings is within the section (b). But a contract for board and lodging generally, without any stipulation for the occupation of any particular rooms, is not (c). An agreement to pay the expenses of investigating the defendant's title to land proposed to be mortgaged to the plaintiff, in consideration that the plaintiff would advance 2000*l.* on a good title being made out, has been held not to be within the section, as the defendant had not entered into a binding agreement to complete the mortgage (d). An agreement to convey an equity of redemption will not be binding unless in writing, "because a court of equity treats the equity of redemption as the land itself—at all events, as an interest in land" (e).

An agreement to do something *collateral* to an existing interest in land is not necessarily within the statute, on account of its connection with the land; therefore an agreement by a tenant to pay an annual sum in consideration of his landlord's making improvements on the demised premises need not be in writing (f).

When a sale of growing crops does, and when it does not confer an interest in land, is often a question of much nicety (g), and Lord Abinger has observed "that no general rule is laid down in any one of the cases that is not contradicted by some other" (h). It will, however, be found that there is a distinction between contracts relating to the natural produce of the land, and contracts re-

(v) *Surcombe v. Pinniger*, *supra*.

(x) *Warden v. Jones*, *supra*.

(y) *Edge v. Stafford*, 1 C. & J. 391;
Inman v. Stamp, 1 Stark. 12.

(z) *Post*, p. 782, note (d).

(a) *Ante*, p. 75.

(b) *Edge v. Stafford*, 1 C. & J. 39;
and *Inman v. Stamp*, 1 Stark. 12.

(c) *Wright v. Staver*, 2 E. & E. 721.

(d) *Jeakes v. White*, 6 Exch. 873.

(e) *Massey v. Johnson*, 1 Exch. 241,
255; *per Rolfe*, B., and see *Hodgkinson*
v. Wyatt, 4 Q. B. 749.

(f) *Hoby v. Roebuck*, 7 Taunt. 157;
Donellan v. Read, 3 B. & Ad. 899.

(g) See *per Rolfe*, B., 1 Exch. 115,
and 1 Wms. Saund. 277, b, note (f).

(h) In *Rodwell v. Phillips*, 9 M. & W.
505.

lating to *fructus industriales*, or such productions as yield an annual profit, and are sown and raised by the industry of man, and which may be taken in execution; there is also a distinction as to whether the produce is to be severed by the buyer or the seller (*i*). An agreement conferring an exclusive right to the vesture of land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands; therefore, an agreement to sell a growing crop of mowing hay, to be mowed and made into hay by the purchaser, requires a written agreement (*j*). So also a sale of growing poles, timber (*k*), or of growing underwood (*l*), or of growing fruit (*m*), to be cut or gathered by the purchaser, is within the fourth section. But where growing timber is sold at so much per foot, to be cut by the seller, the contract is not within the section, for "the object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels" (*n*). A sale of ordinary agricultural produce will not in general be within the section. *Indebitatus assumpsit* for a crop of potatoes bargained and sold, and dug up and carried away by virtue of such bargain and sale. The defendant purchased of the plaintiff, by parol, at so much per sack, a crop of potatoes then in the ground. The defendant was to dig them up and remove them without delay. The defendant accordingly dug up and carried away more than half the crop, but was prevented by the frost from taking the remainder. The plaintiff brought his action to recover the value of the whole crop. The defendant paid into court a sum of money equivalent to the value of that portion of the crop which he had taken. It was objected, that this was a contract or sale of an interest in land. But *per* Lord *Ellenborough*, C. J., the liberty which the defendant had of entering the close for the purpose of taking the crop, amounted to an easement, and nothing more. No interest in the land itself passed, or was intended to pass, by the contract. The defendant could not have maintained ejectment to recover possession of the crop. In this respect this case differed materially from that of *Crosby v. Wadsworth*, which he was not disposed to extend; in that case the subject-matter of the contract was the *prima vestura*, for which ejectment lies, as does also trespass *quare clausum fregit*. But trespass *quare clausum fregit* could not be brought by this defendant for a trespass to the close in which the crop of potatoes grew. It did not follow, that, because the crop of potatoes was not at the time of the contract a chattel, it was, therefore, an interest in land. *Bayley*, J., said it was a thing whose growth was at an end, and in this respect distinguishable

(i) See note (*f*), *supra*.

(j) *Crosby v. Wadsworth*, 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248.

(k) *Teal v. Auty*, 2 Brod. & Bingh. 99; 4 Moore, 542.

(l) *Scorell v. Boxall*, 1 Y. & J. 396.

(m) *Rodwell v. Phillips*, 9 M. & W. 501.

(n) *Smith v. Serman*, 9 B. & C. 573; and *per Bayley*, B., 1 C. & M. 105.

from the case of *Bristow v. Waddington* (o), which was a contract for the next year's crop of hops; and that he considered the land merely as a warehouse, and that the contract was substantially the same thing, as if the potatoes had been deposited in a warehouse at the time of the sale (p). And if the potatoes had been sold while growing, and at so much per acre (q), to be dug and carried away by the purchaser, without any time limited; or if they had been in a growing state, and sold by the cover (r), to be turned up by the seller; or if they had been sold in a similar state at so much per sack (s), to be dug by the purchaser at the usual time, and to be then paid for; the decision would have been the same, that such sales do not fall within the fourth section. "Certainly, when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel" (t).

Plaintiff and defendant orally agreed (in August), that defendant should give 45*l.* for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; and that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn and dig up the potatoes; and plaintiff was to pay the tithe. It was held, that it did not appear to be the intention of the parties to contract for any interest in land, and, therefore, not within the Statute of Frauds, but a sale of goods and chattels, as to all but the lay grass, and as to that, a contract for the agistment of the defendant's cattle (u). A parol agreement for the sale of crops may be good between an outgoing and incoming tenant, for there would be no sale of any interest in the land which must come from the landlord (x). But where a landlord agreed to let a farm by parol, and the tenant was to take the growing crops and pay for them, and also for the work, labour, and materials in preparing the land for tillage; it was held, that the case was within the fourth section. At the time when the contract was made, the crops were growing upon the land, the tenant was to have had the land as well as the crops, and the work,

(o) 2 B. & Pul. 452, in which case the question indirectly arose, but did not require decision. See, as to the authority of this case, *Rodwell v. Phillips*, 9 M. & W. 503.

(p) *Parker v. Staniland*, 11 East, 362; but see *Emmerson v. Heelis*, 2 Taunt. 38.

(q) *Warwick v. Bruce*, 2 M. & S. 205.

(r) *Evans v. Roberts*, 5 B. & C. 829;

8 D. & Ry. 611.

(s) *Sainsbury v. Matthews*, 4 M. & W. 343; *Dunne v. Fergusson*, Hayes (Ir.) 540.

(t) *Per Rolfe, B.*, in *Washbourn v. Burrows*, 1 Exch. 115; and see *Watts v. Friend*, 10 B. & C. 446.

(u) *Jones v. Flint*, 10 A. & E. 753.

(x) *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & Ry. 224.

labour, and materials were so incorporated with the land as to be inseparable from it (y). An action of *indebitatus assumpsit*, with a count on a *quantum meruit*, for moieties of crops of wheat sold by the plaintiff to the defendant, and by the defendant reaped for his own use, and also a count for money had and received: the case was, that the plaintiff, by a parol agreement, had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The defendant having afterwards refused to pay a moiety of the value, this action was brought. It was objected, that the agreement was within the statute, because it related to land; but the court overruled the objection; as the circumstance of the price having been ascertained by the appraisement, brought it to the case of an action for goods sold and delivered (z). "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so: it was originally an agreement to render what should have become a chattel, *i. e.* part of a severed crop in that shape, in lieu of rent; and by a subsequent agreement it was changed to money instead of remaining a specific render of produce" (a). Where tenant, on expiration of term being about to remove fixtures, to which he was entitled, agreed to sell them to his landlord at a valuation, which was afterwards, and after the time expired, made and signed by the brokers; it was held, that this was not a sale of any interest in land (b).

An agreement by a tenant to assign is within the fourth section, whether made absolutely or subject to the consent of the landlord being obtained (c). So an agreement by a tenant with a third person to surrender in his favour and endeavour to persuade the landlord to accept him as tenant must be in writing (d). So an agreement by A., the tenant from year to year of a house under a parol demise for seven years, to give up possession to B., in order that B. might enter thereon as tenant to the landlord (f). So where A., being possessed of a messuage and premises for the residue of a term of years, agreed with B. to relinquish possession to him, and to suffer him to become tenant thereof for the residue of the term, in consideration of B.'s paying a sum of money towards completing some repairs; it was held, that this was an agreement relating to the sale of an interest in land (g). So where

(y) *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.

(z) *Poulter v. Killinbeck*, 1 B. & P. 397.

(a) *Per Lord Ellenborough*, 6 East, 612.

(b) *Hallen v. Runder*, 1 C. M. & R. 266.

(c) *Per Maule, J.*, in *Smart v. Harding*, 15 C. B. 659. See *Anon.*, 1 Ventr. 361.

(d) *Cocking v. Ward*, 1 C. B. 858.

(f) *Kelly v. Webster*, 12 C. B. 283.

(g) *Buttmore v. Hayes*, 5 M. & W. 456.

A. agreed to sell to B. a milk walk, *including possession of the premises*, of which A. was tenant from year to year (*h*).

Where the contract is within the fourth section of the statute, the execution by one of the parties of his part will not take the case out of the statute, so as to enable such party to sue the other at law on the contract for non-performance of his part, even where nothing remains to be done but to pay the consideration (*i*), nor will it make any difference that the defendant has also partly executed the contract as by paying a portion of the consideration (*k*). But in a recent case, where the plaintiff verbally agreed with the defendant to buy the defendant's interest in premises for 37*l.*, the defendant to return 10*l.* in the event of a refusal of a licence to the plaintiff to use them as a slaughter-house, the majority of the Court of Queen's Bench held, that, after the 37*l.* had been paid and possession of the premises given to the plaintiff, the 10*l.* might be recovered back on refusal of the licence, as the promise sued on related wholly to the money (*l*). In equity, however, it is otherwise, and after a part execution by delivery of possession, specific performance will in general be decreed (*m*), but part payment of purchase money is not sufficient (*n*). At law, also, a contract within this section is not treated in the same way as an illegal agreement, for where one of the parties has enjoyed the fruits of such contract, an acknowledgment by him of the consideration being due will support a count on an account stated (*o*). So, also, if goods, such as furniture, stock, &c., be accepted, and kept by the defendant by virtue of a contract, whether wholly or partly within the fourth section, the statute will not prevent their being recovered on a *quantum meruit*, as the action will be on the implied contract arising out of the acceptance of the goods, not on the express contract rendered inoperative by the statute (*p*). And so, also, where the defendant has had the benefit of the plaintiff's work (*q*).

(*h*) *Smart v. Harding*, 15 C. B. 652.

(*i*) *Cocking v. Ward*, 1 C. B. 858; *Smart v. Harding*, 15 C. B. 652; *Boydell v. Drummond*, 11 East, 159; per *Pollock*, C. B., 1 Exch. 252; but see *Collis v. Botthamley*, 7 W. R. 87, *post*, p. 788.

(*k*) *Kelly v. Webster*, 12 C. B. 283.

(*l*) *Green v. Saddington*, 7 E. & B. 503; *Crompton*, J., did not concur; *Hodgson v. Johnson*, 28 L. J., Q. B. 88.

(*m*) *Parker v. Taswell*, 27 L. J., Chan. 812; *Pain v. Coombs*, 1 De G. & J. 34; *Fenner v. Hepburn*, 2 Y. & C. C. C. 159; *Munday v. Jolliffe*, 5 M. & C. 177; *Thynne v. Lord Glengall*, 12 Jur. 805; *Lord Guernsey v. Rodbridges*, Gilb. Eq. Rep. 3.

(*n*) *Ante*, p. 778; and Sugd. Vend. & Pur. (13th edit.) 124, where the authori-

ties as to what is a sufficient part performance will be found.

(*o*) *Cocking v. Ward*, 1 C. B. 858; *Teal v. Auty*, 2 B. & B. 99; *Knowles v. Michell*, 13 East, 249; *Pinchon v. Chilcott*, 3 C. & P. 236.

(*p*) See per Lord Lyndhurst, C. B., in *Lord Falmouth v. Thomas*, 1 C. & M. 109; per *Jervis*, C. J., 18 C. B. 596; *Mavor v. Pyne*, 3 Bingh. 285; *Teal v. Auty*, 2 B. & B. 99; per *Abbott*, C. J., in *Mayfield v. Wadsley*, 3 B. & C. 362; notes to *Peter v. Compton*, 1 Sm. Lead. Ca.; *Hallen v. Runder*, 1 C. M. & R. 266; *Salmon v. Watson*, 4 B. Moore, 73; *Bragg v. Cole*, 6 B. Moore, 114; *Poultier v. Killingbeck*, 1 B. & P. 397.

(*q*) *Gray v. Hill*, R. & M. 420. See, however, *Grimman v. Legge*, 8 B. & C. 326.

From what has been said in respect to a former branch of the section (*r*), it will follow that an entire agreement relating partly to an interest in land; and partly to other matters not within the statute, must be in writing. Therefore, a parol agreement by the plaintiff to let a house to the defendant, to sell him the furniture and fixtures therein, and to make certain improvements, is within the section both as to the furniture and fixtures, and the house (*s*). And so of an agreement to send in furniture in consideration that the plaintiff would take possession of the house, and would, on the furniture being sent in, become tenant of the house and furniture (*t*). But if the part of the contract relating to the interest in land is separable from the rest, so that it amounts to two distinct contracts on distinct considerations, the latter will not be affected by the statute (*u*).

This clause comprehends sales of land by auction (*x*), except such as take place under the decree of the Court of Chancery, or before the master (*y*); and it is now settled, in accordance with the decisions on the 17th section (*z*), but contrary to an opinion that formerly prevailed (*a*), that by bidding at an auction, authority is conferred on the auctioneer, who is originally the agent of the vendor, to sign the contract on behalf of the highest bidder, and that the auctioneer's entry of the name in his book is a sufficient signature to satisfy the statute (*b*), provided the description of the premises and the conditions of sale are embodied in or sufficiently referred to by the book (*c*). And if the bidder is himself only an agent, the entry in the book of such agent's name will nevertheless bind his principal (*d*). The entry, if made by the auctioneer's clerk, will also be sufficient, if made in the presence of the buyer (*e*).

The shares of incorporated joint stock companies seized of landed property do not constitute an interest in land within the 4th section (*f*). Railway shares, even where the undertaking is projected only (*g*), are not within the section (*h*). The shares of

(*r*) *Ante*, p. 768.

(*s*) *Vaughan v. Hancock*, 3 C. B. 766 ; *Price v. Leyburn*, Gow. 109.

(*t*) *Michelen v. Wallace*, 7 A. & E. 49.

(*u*) See judgment in *Mayfield v. Wadslay*, 3 B. & C. 361 ; and *Wood v. Benson*, 2 C. & J. 94.

(*x*) *Walker v. Constable*, 2 Esp. N. P. C. 659 ; 1 B. & P. 306 ; *Buckmaster v. Harrop*, 7 Ves. 341 ; *Blagden v. Bradbear*, 12 Ves. 466.

(*y*) *Attorney-General v. Day*, 1 Ves. 218 ; Sug. Vend. & P. (13th edit.) 120.

(*z*) *Post*, p. 800 ; and see title "Auction."

(*a*) *Stansfield v. Johnson*, 1 Esp. 101 ; *Walker v. Constable*, 2 Esp. 659.

(*b*) *Emmerson v. Heelis*, 2 Taunt. 38 ;

White v. Proctor, 4 Taunt. 209. •

(*c*) *Kenworthy v. Schofield*, 2 B. & C. 945 ; *Blagden v. Bradbear*, 12 Ves. 466 ; 7 East, 569.

(*d*) *White v. Proctor*, 4 Taunt. 209 ; *Kenworthy v. Schofield*, 2 B. & C. 945 ; *Emmerson v. Heelis*, 2 Taunt. 38.

(*e*) *Per Hullock*, B., 1 Y. & J. 389 ; *Bird v. Boulter*, 4 B. & Ad. 443.

(*f*) *Duncuft v. Albrecht*, 12 Sim. 189 ; *Hilton v. Geraud*, 1 De G. & S. 187 ; *Bligh v. Brent*, 2 Y. & C. 294 ; 8 Vict. c. 16, s. 7 ; 19 & 20 Vict. c. 47, s. 15.

(*g*) *Tempest v. Kilner*, 3 C. B. 249.

(*h*) *Bradley v. Holdsworth*, 3 M. & W. 422.

unincorporated companies, or associations of the like nature, are not within the statute, unless the individual shareholders take a direct interest in the land (*i*). Hence shares in a mine worked on the cost book principle do not come within it, in the absence of evidence that the shareholders take such interest (*k*), as a mine may be worked under a mere licence (*l*). If, however, the title to the realty is shown to be in a body of mining adventurers, the shares will be an interest in land (*m*). The Westminster improvement bonds are within the statute (*n*).

Or upon any Agreement that is not to be performed within the Space of One Year from the making thereof.—This clause extends to those cases where, by the express agreement of the parties, the act is not to be performed on either side within a year, and not to contracts which may or may not happen to be performed within that space of time. Hence, a contract for a year's service, to commence at a subsequent day, is within this clause, and must be in writing (*o*), though a contract for service under a general hiring need not be so (*p*). So a contract to employ a clerk for five years, and pay a yearly salary (*q*). So a contract for a partnership during a term of years (*r*); but a contract to share the profits of an undertaking to make a canal may be by parol, although the canal is incapable of being made within a year (*s*). But, on the other hand, it has been held, that a promise to pay money on the return of a ship, which happened not to return within two years after the promise made, was not within the statute; for, by possibility, the ship might have returned within a year (*t*). So where an action was brought upon an agreement, in which the defendant promised, for one guinea, to give the plaintiff so many on the day of his marriage. The marriage did not take effect until nine years after the agreement; and the question was, whether the agreement ought to have been in writing. *Holt*, C. J., before whom the cause was tried, advised with all the judges; and it was said by them, *dissentiente Holt*, "Where the agreement is to be performed upon a contingency, and it does not appear on the face of the agreement that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year; but where it appears, from the whole tenor of the agreement,

(*i*) See *per* Lord Denman, C. J., in *Humble v. Mitchell*, 11 A. & E. 208, and cases in next note.

(*k*) *Watson v. Spratley*, 10 Exch. 222; *Powell v. Jessop*, 18 C. B. 336; *Walker v. Bartlett*, *ibid.*, 845.

(*l*) See *per* Bramwell, B., 18 C. B. 859, that a licence is not within the statute. See *ante*, p. 761.

(*m*) *Boyce v. Green*, Batty, (Ir.), 608; *Caddick v. Skidmore*, 27 L. J., Chan. 153.

(*n*) *Toppin v. Lomas*, 16 C. B. 145.

(*o*) *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20. See *Cawthorne v. Cawdrey*, 13 C. B. N. S. 406.

(*p*) *Beeston v. Collier*, 4 Bingh. 309.

(*q*) *Girard v. Richmond*, 2 C. B. 835; and see *Sweet v. Lee*, 4 Scott, N. R. 77; 3 M. & G. 452.

(*r*) *Williams v. Jones*, 5 B. & C. 110.

(*s*) *M'Kay v. Rutherford*, 6 Moo. P. C. C. 414; 13 Jur. 21.

(*t*) *Anon.*, Salk. 280; see *per* Wilmot, J., 3 Burr. 1281.

that it is to be performed *after* the year, there a note in writing is necessary" (u). All the judges, it appears, agreed that if the marriage had taken effect within the year no writing was necessary; but as it did not happen until nine years after the promise, *Holt*, C. J., and the minority of the judges, were of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year (x). So where the plaintiff declared that the defendant's testator, in consideration that the plaintiff would become his housekeeper, and take upon herself the care and management of his family, as long as it should please both parties, undertook to pay her wages at the rate of £ for one year, *and also by his will to bequeath to her an annuity of £ for life, payable yearly from the day of his death*; and then averred, that she became his housekeeper, and so continued for three years and upwards, but that the defendant's testator had not bequeathed her the annuity; the agreement having been by parol, it was contended, that the case was within the statute, for it could not be performed on the part of the testator within a year; for a whole year from his death was to elapse before the annuity, or any part of it, would become payable. To this it was answered, that the action was brought for not bequeathing the annuity by will, which might have been done within the year. The court held the case not within the statute, and *Denison*, J., said, "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency. It does not extend to cases where the thing *may* be performed within the year" (y). So where A., being indebted to the plaintiff, promised plaintiff that, in consideration of his forbearing to sue, A.'s executor should pay him 10,000*l.*; it was held, that the statute did not require this promise to be in writing (z). So also a contract to maintain a child, at the defendant's request, "so long as the defendant shall think proper," is not within the statute (a).

It is not essential, however, in order to bring the case within this clause, that the agreement should be absolute to extend beyond the year; it will be enough if it appears that the reasonable expectation of the parties at the time it was made was that it would so extend (b). Hence, if it appear to have been the understanding of the parties to a contract at the time, that it was not to be completed within a year, although it might be, and was in fact, in part per-

(u) *Peter v. Compton*, Skin. 353; 1 Sm. Lead. Ca. 241.

(x) See *Smith v. Westall*, 1 Ld. Raym. 317; *Framcam v. Foster*, Skin. 326.

(y) *Fenton v. Emblers*, 3 Burr. 1278; 1 Bl. R. 353; and see *Gilbert v. Sylkes*, 16 East, 154.

(z) *Wells v. Horton*, 4 Bingh. 40.

(a) *Souch v. Strawbridge*, 2 C. B. 808; and see *Crowhurst v. Laverack*, 8 Exch. 208.

(b) *Roberts v. Tucker*, 3 Exch. 632; *Donellan v. Read*, 3 B. & Ad. 906.

formed within that time, such contract is within this clause, and if the requisites of the statute are not complied with, it cannot be enforced (c). For part performance, as has before been observed, will not take the case out of the statute at law (d), and "the contract must, with reference to this point, be good or bad at the time it is made" (e). So, also, a contract which by its general terms is not to be performed within a year, is not taken out of the statute by being made subject to a defeasance within the year (f); therefore, a contract, whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which by the custom of the trade, is determinable at any time within that period upon the payment of a year's hire, is an agreement not to be performed within a year, within the meaning of this clause, and, therefore, must be in writing (g). So a contract for service for more than a year, but subject to determination within the year on a given event (h). "But where the contract is for a year, subject to a proviso for enlargement, that is only a contract for one year" (i).

By the word "performed," in this clause, is meant the entire performance of the contract *by both parties*; if, therefore, it is contemplated by the agreement that it is to be performed by one of the parties, as to his share, within the year, the statute does not apply (k). Thus, in *Donellan v. Read* (l), it was held, that a parol agreement by a tenant to pay 5*l.* a year for several years, in consideration of his landlord laying out 50*l.* in making some improvements, might be enforced by the landlord. "We think," says *Littledale, J.*, "that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation that it should be so, the Statute of Frauds does not extend to such a case" (m). A learned author has made some reflections on this case which would seem entitled to great weight (n). It has, however, since been confirmed by the Court of Exchequer (o); *Parke, B.*, observing, that "the question turns upon the construction of the words 'not to be performed,' and in *Donellan v. Read* the court considered that those words meant not to be performed *on either side*, and did not include cases where the contract was performed on the one side" (p). The Court of Common Pleas have also adopted the same view, and have laid down the rule to be, that, an agreement, whereby all that is to be done by the plaintiff, constituting one entire con-

(c) *Boydell v. Drummond*, 11 East. 142.

(d) *Ante*, pp. 778, 783.

(e) *Per Cresswell, J.*, in *Smith v. Neal*, 2 C. B., N. S. 81.

(f) *Dobson v. Collis*, 1 H. & N. 81.

(g) *Birch v. Earl of Liverpool*, 9 B. & C. 392.

(h) *Dobson v. Collis*, 1 H. & N. 81.

(i) *Per Alderson, B.*, 1 H. & N. 83.

(k) *Bracegirdle v. Heald*, 1 B. & Ald. 727.

(l) 3 B. & Ad. 899; and see *Hoby v. Roebuck*, 7 Taunt. 157.

(m) 3 B. & Ad. 906.

(n) 1 Sm. Lead. Ca. 242.

(o) *Cherry v. Heming*, 4 Exch. 631.

(p) 4 Exch. 635.

sideration for the defendant's promise, is capable of being performed within a year, and no part of what the plaintiff is to do, constituting such consideration, is intended to be postponed until after the expiration of the year, is not within the section, notwithstanding the performance on the part of the defendant is or may be extended beyond that period (q).

By parol agreement the defendant agreed with the plaintiff to serve him for a year from a future day, and that the service should thenceforth continue, subject to be determined by three months' notice. After three years' service the defendant quitted the plaintiff without notice, and it was held, that the plaintiff might maintain an action for breach of this agreement, notwithstanding the Statute of Frauds (r).

Unless the Agreement or some Memorandum or note thereof shall be in Writing.—The word *agreement* is not to be understood in the loose incorrect sense in which it is sometimes used as synonymous to *promise or undertaking*, but in its proper and correct sense, as signifying a mutual contract on consideration between two or more parties. Hence, the whole agreement, that is, not the promise only, but the consideration on which it is founded, must be in writing (s); except in the case of a special promise to answer for the debt, default or miscarriage of another, made since the 29th July, 1856 (t). This exception is introduced by the third section of "The Mercantile Law Amendment Act, 1856" (u), which enacts, that no such last-mentioned promise, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. This enactment, it will be observed, in terms applies only where *no* consideration is stated in the writing; it would seem, therefore, that where *an insufficient* consideration is stated, protection would not in general be afforded, inasmuch as parol evidence of the true consideration, if inconsistent with that mentioned in the writing, would be inadmissible (v). Neither does it extend to all the matters mentioned in the fourth section of the Statute of Frauds. It will, in consequence, be necessary to refer very briefly to the large class of cases upon this head, which were decided before the recent act, although they arose principally on the construction of guarantees.

(q) *Smith v. Neale*, 2 C. B., N. S. 67.

(r) *Collis v. Botthamley*, 7 W. R. 87; but see *ante*. p. 783.

(s) *Wain v. Warlters*, 5 East, 10; 2 Sm. Lead. Ca. 191; *Saunders v. Wakefield*, 4 B. & A. 595; *Jenkyne v. Reynolds*, 3 B. & B. 14; *Morley v. Boothby*, 3 Bingh.

113; *Clancy v. Piggott*, 2 A. & E. 418; *Sweet v. Lee*, 3 M. & G. 452; 4 Sc. N. R. 77.

(t) 19 & 20 Vict. c. 97, s. 3.

(u) *Ibid*.

(v) See *Oldershaw v. King*, 2 H. & N. 399; and *Goldshede v. Swan*, 1 Exch. 160.

The result of the cases appears to be, that the names of the contracting parties (*x*), the subject-matter of the contract, the several terms agreed upon (*y*), and the consideration, except as above mentioned, must appear on the face of the writing (*z*); but it is sufficient if the consideration appear by necessary implication (*a*). The consideration so appearing must be such as to leave no doubt or ambiguity respecting it (*b*); for if two considerations may with equal propriety be inferred, the statute is not complied with (*c*). It need not, however, appear "in any formal set terms, but with clearness enough to enable the court to judge of its sufficiency" (*d*); and "all the cases agree that it is enough if the consideration can *fairly be collected* from the terms of the writing" (*e*). The consideration may, of course, be either executed contemporaneously with the writing, or be executory or conditional (*f*); and an executory consideration will support a promise to pay past as well as future debts (*g*), in which case it is not essential that the consideration should correspond in value with the sum secured (*h*). The agreement also may be made partly on a bygone and partly on a future consideration (*i*), but a consideration wholly past will support no promise, unless moved by a previous request, in which case it will support such promise as would have been implied by law (*k*). Where it is consistent with the words used that the consideration may be either executory or past, the former construction will be adopted "*ut res magis valeat quam pereat*" (*l*); and parol evidence of the surrounding circumstances is always admissible, in order that the instrument may be construed with reference to them (*m*). The following case affords an example of what is meant above by an executory consideration:—An action was brought to recover the value of goods, which had been furnished by the plaintiff to one Nichols, under a written

(*x*) *Skelton v. Cole*, 1 De G. & J. 587; and see *post*, p. 801.

(*y*) *Fitzmaurice v. Bayley*, 27 L. J., Q. B. 142; *Skelton v. Cole*, 1 De G. & J. 587.

(*z*) See p. 788.

(*a*) *Hawes v. Armstrong*, 1 B. N. C. 761; *Raikes v. Todd*, 8 A. & E. 846; *Kennaway v. Treleavan*, 5 M. & W. 498; *Jarvis v. Wilkins*, 7 M. & W. 410; *Caballero v. Salter*, 14 C. B. 300.

(*b*) *Bainbridge v. Wade*, 16 Q. B. 100; *Price v. Richardson*, 15 M. & W. 539; *Hawes v. Armstrong*, 1 B. N. C. 761; *Ellis v. Levi*, 1 B. N. C. 767, note; *Lang v. Nevill*, 6 Jur. 217.

(*c*) *Cole v. Dyer*, 1 C. & J. 461.

(*d*) *Per Best*, C. J., in *Morley v. Boothby*, 3 Bingh. 107; and see *Baring v. Grieve*, 31 L. T. 96.

(*e*) *Per Wightman*, J., in *Powers v. Fowler*, 4 E. & B. 518; *Bainbridge v.*

Wade, 16 Q. B. 100; *Newberry v. Armstrong*, 6 Bingh. 201.

(*f*) *Stadt v. Lill*, 1 Campb. 242; 9 East, 348, S. C.

(*g*) *Johnson v. Nicholls*, 1 C. B. 251; *White v. Woodward*, 5 C. B. 810; *Boyd v. Moyle*, 2 C. B. 644; *Russell v. Moseley*, 3 B. & B. 211; 6 B. Moore, 521, *Exp. Littlejohn*, 5 M. D. & D. 182.

(*h*) *Per Cresswell*, J., in *Johnson v. Nicholls*, 1 C. B. 271.

(*i*) *Chapman v. Sutton*, 2 C. B. 634.

(*k*) *Bell v. Welch*, 9 C. B. 154; *Edwards v. Jevons*, 8 C. B. 445; *Roscorla v. Thomas*, 3 Q. B. 234.

(*l*) *Steele v. Hoe*, 14 Q. B. 431; *Broom v. Batchelor*, 1 H. & N. 255.

(*m*) *Butcher v. Stewart*, 11 M. & W. 857; 1 Wms. Saund. 211; *Edwards v. Jevons*, *supra*; *Bell v. Welch*, 9 C. B. 154; *Haigh v. Brooks*, 10 A. & E. 309.

agreement signed by the defendant in the following words: "I guarantee the payment of any goods which Mr. John Stadt delivers to I. Nichols." It was objected, that this guarantee was void, because it did not express any consideration for the defendant's promise to answer for the debt of another, as there was no undertaking on the part of the plaintiff to deliver goods to Nichols, and no action would have lain against him had he refused to deliver any. Verdict for plaintiff, upon an application to the court to set aside which, the court said, that this case differed from *Wain v. Warlters*, as the agreement here contained the thing to be done by the plaintiff, which was the foundation of the defendant's promise; and that the delivery of the goods was a sufficient consideration, although no action upon the agreement could have been brought against the plaintiff, either at the suit of the defendant or of Nichols. Rule nisi refused (*n*). If the writing contain a promise to pay the *debt* of another, it is sufficient without mentioning the amount (*o*). The fourth section says, "not that an agreement which is not in writing shall be void, or shall not be allowed to be good, but merely that *no action shall be brought upon it*. It requires that the agreement, to be the foundation of an action, or some memorandum or note thereof, shall be in writing, and signed. A letter written and signed by the party, containing the terms of the agreement, though addressed to a third person, satisfies the letter as well as the object of the statute" (*p*). So also a written adoption of a parol contract is enough (*q*); as where the defendant, after having entered into a parol agreement for a lease, signed an indorsement on a draft lease admitting the agreement (*r*); but an award under a parol submission is not (*s*).

One paper referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed; but where the first paper was in these words, "I agree to let the premises in G. L., containing three stables, for the same rent and subject to the same conditions that I hold them myself," it was held that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a sufficient memorandum of the agreement (*t*).

As to the requisites of the writing in respect to signature, see *post*, p. 800.

17th Section.—"No contract for the sale of any goods, wares, and merchandizes, for the *price* of ten pounds or upwards, shall be

(*n*) *Stadt v. Lill*, 1 Camp. 242; 9 East, 348, S. C.

(*o*) *Bateman v. Phillips*, 15 East, 272.

(*p*) *Per Maule, J.*, in *Leroux v. Brown*, 12 C. B. 821. See *Jones v. Williams*, 7 M. & W. 493; Sugd. Vend. & Pur. 113; *Welford v. Beazeley*, 3 Atk. 503; *Seagood v. Meale*, Prec. Chanc. 560; *Cooke v. Tombs*, 2 Anstr. 420; *Owen v. Thomas*,

3 M. & K. 353; *Smith v. Watson*, Bunb. 55; and *post*, p. 799.

(*q*) *De Biel v. Thompson*, 3 Beav. 469; 12 Cl. & F. 45.

(*r*) *Shippey v. Denison*, 5 Esp. 190.

(*s*) *Walters v. Morgan*, 2 Cox. Eq. C. 369.

(*t*) *Fitzmaurice v. Bayley*, 9 H. of L. Cases, 78. See *Baumann v. James*, L. R., 3 Ch. App. 508.

good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

No Contract for the Sale of any Goods, &c., for the price, &c., shall be good.—This branch of the statute extends to executory contracts, that is, contracts to be completed at a future time, as well as other contracts; but in many cases a distinction used to be taken between those contracts, where the thing contracted for was existing *in solido*, and capable of being delivered at the time of the contract, or would be at the time of delivering a personal chattel (*u*), and those, where it was requisite that something should be done, in order to put the thing into the state in which it was to be delivered according to the contract; the former having been held to be within (*x*) the statute, the latter not (*y*). But now, by 9 Geo. IV. c. 14, s. 7, it is provided, that the enactment of this seventeenth section shall extend to all contracts for sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery. The two statutes are to be construed as incorporated together (*z*). The last act has the word *value*, and not *price*; the effect, therefore, is to substitute "value" for "price" in the former statute, and to adopt an uniform rule in all cases (*a*). Hence where an executory contract is entered into for the fabrication of goods, without any agreement as to price, the memorandum of the contract required by the Statute of Frauds is sufficient, without specification of price (*b*). The words of the seventeenth section, by which it is declared, that contracts not made in the manner prescribed shall not be good, it will be observed are stronger than those of the fourth section, and render such contracts wholly void (*c*).

The Statute of Frauds does not exclude parol evidence that a written contract for sale of goods, purporting to be made between A. the seller, and B. the buyer, was on B.'s part made by him only

(*u*) *Watts v. Friend*, 10 B. & C. 446.

(*x*) *Rondeau v. Wyatt*, 2 H. Bl. 63;
Garbutt and another v. Watson, 5 B. &
A. 613; *Smith v. Surman*, 9 B. & C.
568.

(*y*) *Clayton v. Andrews*, 4 Burr. 2101;
Groves v. Buck, 3 M. & S. 178.

(*z*) *Harman v. Reeve*, 18 C. B. 587;

Scott v. Eastern Counties Railway Co.,
12 M. & W. 33.

(*a*) *Per Jervis*, C. J., 18 C. B. 595.

(*b*) *Hoadley v. M'Laine*, 10 Bingh. 482;
4 M. & Sc. 340.

(*c*) *Laythorpe v. Briant*, 2 B. N. C.
747.

as agent for C. (*d*), provided that the evidence is offered to charge C., and not to discharge B. (*e*).

Goods, Wares, and Merchandizes.—Shares in joint-stock banking companies (*f*), railway companies (*g*), joint-stock mining companies (*h*), and the like, are not within these words; nor is a contract to buy, sell, or deliver Spanish bonds (*i*). A contract for the sale of growing crops is within this section, if they are to be delivered as personal chattels (*k*). A contract for the sale of fixtures need not, as it would seem, be in writing (*l*). A contract to print a book at so much a sheet, paper included, is not within the section, the paper being merely accessory to the work and labour (*m*). But a contract to make a set of artificial teeth is within the seventeenth section of the statute, and in order to decide whether a contract be for work and labour or for the sale of a chattel, the value of the skill and labour as compared with the material supplied, is not a criterion (*n*). An agreement for the sale of goods to the value of 10*l.* and upwards, is not the less within the statute, because it also is made to embrace something to which the statute does not extend (*o*).

Except the Buyer shall accept Part of the Goods so sold, and actually receive the same.—In order to take a contract for the sale of goods, of the price of 10*l.* or upwards, out of the statute, there must be either a receipt and acceptance, by the vendee, of the whole or a part of the thing sold, or something given in earnest, or a part payment of the consideration; otherwise the agreement must be reduced to writing in the manner specified by this section. In order to satisfy the enactment it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice (*p*). To satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an acceptance by the vendee, with an intention of taking the possession as owner (*q*); or, in other words, there must be “a contract of sale, and an acceptance and receipt by the vendee in the character of owner of the goods contracted to be sold, leaving it to parol

(*d*) *Wilson v. Hart*, 7 Taunt. 295.

(*e*) See *post*, pp. 810, 811.

(*f*) *Humble v. Mitchell*, 3 P. & D. 141; 11 A. & E. 205.

(*g*) *Bowlby v. Bell*, 3 C. B. 284; *Duncuft v. Albrecht*, 12 Sim. 189.

(*h*) *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Exch. 53, S. C.; but see *Boyce v. Green*, Batty, 608.

(*i*) *Heseltine v. Siggers*, 1 Exch. 856; 18 L. J., Exch. 166, S. C.; and see *Pawle v. Gunn*, 4 B. N. C. 445.

(*k*) *Watts v. Friend*, 10 B. & C. 448; *Smith v. Surman*, 9 B. & C. 561. See *ante*, p. 781.

(*l*) *Hallen v. Runder*, 1 C. M. & R. 266; *Horsfall v. Key*, 2 Exch. 778.

(*m*) *Clay v. Yates*, 1 H. & N. 73.

(*n*) *Lee v. Griffin*, 1 B. & S. 272.

(*o*) *Harman v. Reeve*, 18 C. B. 587.

(*p*) *Cusack v. Robinson*, 1 B. & S. 299.

(*q*) *Per Cur.* in *Phillips v. Bristolli*, 2 B. & C. 511.

evidence to show what the precise terms of the bargain were" (*r*). The acceptance must be unequivocal (*s*), but it may nevertheless be constructive; as by delivery of the key of the warehouse in which the goods are lodged (*t*), since "the larger the bulk, the more impracticable it is that there should be a manual receipt: something there must be in the nature of constructive receipt, as there is constructive delivery" (*u*), and in almost all cases it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do, are an acceptance or otherwise (*x*). It seems to be established that there cannot be any acceptance unless there has been such a dealing on the part of the purchaser as to deprive the seller of his right of lien (*y*): as to whether the dealing must also have been such as to deprive the purchaser of any right to object to the quality or quantity of the goods, some difference of opinion appears still to prevail (*z*), notwithstanding a recent decision of the Queen's Bench in the negative (*a*). These principles will be illustrated by the following instances.

One person in possession of the goods of another as bailee or tenant, may become purchaser of them by parol, and may do subsequent acts without any writing between the parties, which amount to acceptance; as, for instance, if he sells or attempts to sell the goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property or the like: and parol evidence is admissible to explain the character of the acts relied on (*b*), but the vendor may at any time disaffirm such sale before the vendee does anything to bind the bargain (*c*). If, however, the buyer has "taken to" the goods before the contract is disaffirmed, it will, as it would seem, bind the bargain in favour of the buyer as well as the seller (*d*). Where goods are delivered to the vendee, any objection on account of non-compliance with

(*r*) *Per Crowder, J.*, in *Tomkinson v. Staight*, 17 C. B. 707.

(*s*) *Maberley v. Shepherd*, 10 Bingh. 101.

(*t*) *Per Lord Kenyon, C. J.*, 1 East, 195.

(*u*) *Per Williams, J.*, in *Bushell v. Wheeler*, 15 Q. B. 445.

(*x*) *Per Lord Campbell*, in *Morton v. Tibbett*, 15 Q. B. 441; *Bushell v. Wheeler*, *ibid.* 442.

(*y*) *Per Parke, J.*, 9 B. & C. 577, and 9 M. & W. 41; *per Ld. Campbell, C. J.*, in *Morton v. Tibbett*, 15 Q. B. 438; *Maberley v. Shepherd*, 10 Bingh. 99; *Tempest v. Fitzgerald*, 3 B. & A. 683; *Carter v. Toussaint*, 5 B. & A. 855; *Dodsley v. Varley*, 12 A. & E. 632; *Holmes v. Hoskins*, 9 Exch. 756; *Smith v. Surman*, 9 B. & C. 561.

(*z*) *Hunt v. Hecht*, 8 Exch. 814; *Howe*

v. Palmer, 3 B. & A. 321; *Tempest v. Fitzgerald*, *ibid.* 680; *Hanson v. Armistage*, 5 B. & A. 557; *Carter v. Toussaint*, *supra*; *per Alderson, B.*, 14 M. & W. 277.

(*a*) *Morton v. Tibbett*, 15 Q. B. 428; *per Lord Campbell, C. J.*, in *Parker v. Wallis*, 5 E. & B. 26. As to the distinction between an acceptance and a receipt, see *Farina v. Home*, 16 M. & W. 123, and 15 Q. B. 434. Mr. Justice Erle has expressed a doubt whether the person who inserted the word had any idea what he meant by "acceptance." See 6 E. & B. 734.

(*b*) *Edan v. Dudfield*, 1 Q. B. 302; *Lillywhite v. Devereux*, 15 M. & W. 291.

(*c*) *Taylor v. Wakefield*, 6 E. & B. 765.

(*d*) *Ibid.*

the order or otherwise, must be made within a reasonable time, otherwise the vendee will be considered as having accepted them (*e*). But if the vendee, before doing anything to bind the bargain on his part, and within a reasonable time after the delivery, returns the goods to the vendor, there will be no acceptance, and any question as to non-compliance with the order will be immaterial (*f*). Thus where A., on a verbal order, sent to B. a bale of sponge, and B. returned it by a carrier, and sent a letter stating that he had done so, having examined it, and found it not to be worth the price charged, it was held that there was no acceptance of the sponge to take the case out of the statute, and the plaintiff was nonsuited (*g*). There can in general be no acceptance unless the vendee has had an opportunity of judging whether the goods sent correspond with the order; hence, where to comply with the order, it is necessary to select and separate the goods sold from a larger bulk, there can be no acceptance of the smaller quantity before such separation (*h*).

The conduct of the vendee after receipt of the goods, will often afford a criterion for determining whether he has accepted them; as if he does any act to the goods which would be of wrong if he were not owner of them, and of right if he were, the doing of that act is evidence that he has accepted them (*i*). Thus where the vendee unpacks a perishable article, as seed, and spreads it out, such spreading out will not be a conclusive acceptance, even though it might materially alter the condition of the thing, because it might have been so treated by authority of the vendor, or for the benefit of the article on account of its state; and consequently it will be a question for the jury with what intent the act was done (*k*). Acts done for the mere purpose of examination of the goods, do not constitute an acceptance (*l*). If the vendee, after having had an opportunity of judging of the goods, resells a portion or the whole to a sub-vendee, he will be taken to have accepted them (*m*); and such resale may amount to an acceptance and actual receipt, even where the vendee has had no such opportunity (*n*). And the expressions used by the vendee on receipt of the goods are sometimes material to be considered (*o*). It would appear that the acceptance and retention of the bill of lading or

(*e*) *Coleman v. Gibson*, 1 M. & Rob. 168, Lord Tenterden, C. J.; *per* Lord Campbell, C. J., 5 E. & B. 26.

(*f*) *Johnson v. Dodgson*, 2 M. & W. 653.

(*g*) *Kent v. Huskinson*, 3 B. & P. 233. See, also, cases cited in next note.

(*h*) *Hunt v. Hecht*, 8 Exch. 814; *Cunliffe v. Harrison*, 6 Exch. 903; *Gorman v. Boddy*, 2 C. & K. 145; *Acraman v. Morrice*, 8 C. B. 449; *Levy v. Green*, 8 E. & B. 576.

(*i*) *Parker v. Wallis*, 5 E. & B. 28.

(*k*) *Parker v. Wallis*, 5 E. & B. 28; *Curtis v. Pugh*, 10 Q. B. 111; and see *Elliott v. Thomas*, 3 M. & W. 170.

(*l*) *Ibid.*

(*m*) *Chapman v. Morton*, 11 M. & W. 534; *Harnor v. Groves*, 15 C. B. 667; *Chaplin v. Rogers*, 1 East, 192; *Blenkinsop v. Clayton*, 7 Taunt. 597.

(*n*) *Morton v. Tibbett*, 15 Q. B. 428.

(*o*) *Saunders v. Topp*, 4 Exch. 390.

other indicia of property in goods, may amount to an acceptance and receipt, though the goods themselves are not received (*p*).

Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole (*q*), and it makes no difference that some of the goods ordered are ready made at the time, and the others are to be manufactured according to order, and the ready made goods are afterwards delivered and paid for (*r*). So where, under a contract to sell goods of particular quality, a portion of them, but of an inferior description, is delivered, retainer of this portion by the vendee will be a waiver of any objection to the quality of this portion, and will consequently bind the bargain as to the whole (*s*). Where a sample is delivered to and accepted by the purchaser, and such sample is to be accounted for in the weight or measure of the commodity sold, this will be considered as a sufficient acceptance and receiving of part of the goods, so as to take the case out of the statute (*t*); but the delivery of a sample which is no part of the thing sold, will not (*u*). After a bargain and sale of a stack of hay between the parties on the spot where the stack stood, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to, and an acceptance by, the vendee, so as to take the case out of the statute (*x*).

There may be an acceptance and receipt to satisfy the statute, though the goods are never out of the possession of the vendor, but for this purpose it is necessary that the character of that possession should be changed, that is, that the former owner should have ceased to hold them in his character of unpaid vendor, and should have commenced to hold them as warehouse keeper for the vendee (*y*). Thus where a bargain for the purchase of a horse to be delivered immediately had been completed, and the vendee afterwards agreed to lend him to, and left him with, the vendor, it was held that there was a sufficient acceptance within the statute (*z*). So where a person having purchased a horse of a horse-dealer desired him to keep the horse at livery for him, and the horse-dealer accepted the order, and put the horse out of his sale-stable into another stable: this was held, to be a sufficient delivery, so as to take the case out of the statute (*a*). But where

(*p*) *Meigh v. Meredith*, 2 E. & B. 374.

(*q*) *Elliott v. Thomas*, 3 M. & W. 170;
Bigg v. Whiskin, 14 C. B. 195.

(*r*) *Scott v. The Eastern Counties Railway Co.*, 12 M. & W. 33; and see *Thompson v. Maceroni*, 3 B. & C. 1.

(*s*) *Gilliatt v. Roberts*, 19 L. J., Exch. 410.

(*t*) *Hinde v. Whitehouse*, 7 East, 558;
Kilmitz v. Surrey, 5 Esp. 268; *Gardner v. Grout*, 2 C. B., N. S. 340.

(*u*) *Talver v. West*, Holt, N. P. C. 178; *Nicholson v. Bower*, 28 L. J., 97 Q. B.

(*x*) *Chaplin v. Rogers*, 1 East, 192.

(*y*) *Beaumont v. Brengeri*, 5 C. B. 315.

(*z*) *Marvin v. Wallis*, 6 E. & B. 726.

(*a*) *Elmore v. Stone*, 1 Taunt. 458; and see *Beaumont v. Brengeri*, 5 C. B. 301.

a horse was sold by verbal contract, but no time was fixed for the payment of the price; the horse was to remain with the vendors for twenty days without any charge to the vendee; at the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors: it was held, that there was no acceptance of the horse by the vendee (b). So where a vendee verbally agreed, at a public market, with the agent of the vendor, to purchase twelve bushels of tares, (then in vendor's possession, constituting part of a larger quantity in bulk,) to remain in vendor's possession until called for, and the agent, on his return home, measured the twelve bushels and set them apart for the vendee; it was held, that this did not amount to an acceptance by the latter, so as to take the case out of the statute (c). So where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon; about the expiration of that time, A. rode the horse, and gave directions as to its treatment, &c., but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price, to which B. assented; the horse died before A. paid the price or took it away: it was held, that there was not any acceptance within the statute (d). So where a corn-factor, at Nottingham, and who also had a warehouse at Derby, on the 18th November agreed to sell to the defendant a quantity of barley, the property of the plaintiff, and then in the hands of J. S. for the purpose of being kiln-dried, at 38s. per quarter, to go by the corn-factor's first boat, and to be delivered at Derby at the corn-factor's warehouse. The 38s. per quarter was a higher price on account of the delivery being at the corn-factor's expense. Afterwards the defendant went to J. S., told him he had bought the barley, and desired him to see it delivered and measured, and put up properly. Two or three days afterwards the barley was sent by the first boat, and on the 26th November the corn-factor's clerk saw the defendant at Derby, and delivered him the invoice, which the defendant took and requested a week longer for payment, which was allowed him, but on the same day gave notice that he would not accept the barley. The barley arrived at the warehouse at Derby on the 1st of December. In assumpsit for goods sold and delivered: it was held, that there being no note in writing the contract was void (e). A. went to the shop of B. and Co., linendrapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks.

(b) *Carter v. Toussaint*, 5 B. & A. 855; and see *Holmes v. Hoskins*, 9 Exch. 753.

(d) *Tempest v. Fitzgerald*, 3 B. & A. 680.

(e) *Astey v. Emery*, 4 M. & S. 262.

(c) *Howe v. Palmer*, 3 B. & A. 321.

He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them. It was held, that this was all one contract, and therefore within the statute, and that there was no delivery and acceptance of any of the goods so as to take the case out of the operation of this section (*f*). Where, however, wool sold by the plaintiff to the defendant was removed to a warehouse of a third person, where it was weighed and packed in sheeting of the defendant's, and the course of dealing was that the wool remained on these premises till paid for, it was held that there was a sufficient receipt and acceptance of the goods notwithstanding the plaintiff's special interest, not properly a lien, in respect of the engagement not to remove them till paid for (*g*). The defendants verbally agreed to purchase of the plaintiff four stacks of cotton waste, at 1s. 9d. per pound. They sent their own packer with their sacks and their own carts to fetch it. Their packer packed the waste into eighty-one sacks, twenty-one of which were weighed, and then loaded on the defendants' cart and taken to the defendants' premises. The rest of the sacks were not weighed. On the arrival of the twenty-one sacks the defendants refused to accept any portion, on the ground that it was of inferior quality. It was held that the property in the waste had passed to the defendants, and that there was sufficient evidence of an acceptance and receipt to satisfy the statute (*h*).

So where hops were sold by sample, and before prompt day the buyer's foreman attended at the warehouse of the seller to see them weighed, compared each pocket with the sample and adjusted allowances on some which he objected to, this was held a sufficient acceptance (*i*).

Where defendant employed plaintiff to make a waggon, and whilst it was at the plaintiff's yard unfinished, and during the progress of the work, the defendant procured a third person to fix on the iron work, and a tilt, it was held that this did not constitute an acceptance (*k*).

It is now clearly established, contrary to what was formerly held (*l*), that the mere delivery of the goods to and acceptance of them by a carrier or agent to forward them, whether selected by the vendee or not, will not be an acceptance and receipt of the goods by the vendee (*m*). Thus where A., a merchant resident

(*f*) *Baldey v. Parker*, 2 B. & C. 37. See, also, *Bill v. Bament*, 9 M. & W. 36.

(*g*) *Dodsley v. Varley*, 12 A. & E. 632. See also, *Aldridge v. Johnson*, 7 E. & B. 885.

(*h*) *Kershaw v. Ogden*, 34 L. J., 159 Ex.

(*i*) *Simmonds v. Humble*, 13 C. B. (N. S.) 258.

(*k*) *Maberley v. Shepherd*, 10 Bingh.

99.

(*l*) *Hart v. Sattley*, 3 Campb. 528.

(*m*) *Meredith v. Meigh*, 2 E. & B. 364; *Hansom v. Armitage*, 5 B. & A. 557; *Norman v. Phillips*, 14 M. & W. 276; *Coombs v. The Bristol and Exeter Railway Co.*, 3 H. & N. 510; *Hunt v. Hecht*, 8 Exch. 814; *Morton v. Tabbett*, 15 Q. B. 428; *Bushell v. Wheeler*, *ibid.* 442; *Hart v. Bush*, 27 L. J., Q. B. 271.

in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship; and, in pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded as usual; it was held, that this was not an acceptance by the buyer, sufficient to take the case out of the statute (*n*). Timber was ordered to be sent to the vendee at Wallingford, by the Great Western Railway, according to the previous course of dealing between the parties. The timber arrived at Wallingford accordingly on the 19th April, when the vendee told the railway clerk he would not take it. An invoice was sent a day or two afterwards, which the vendee received and kept until the 28th May, when he informed the vendor that he declined to take the timber. It was held, that there was not sufficient evidence to warrant the jury in finding that there had been an acceptance of the timber, and the court set aside a verdict for the plaintiff as not warranted by the evidence (*o*).

Where the goods are in the hands of a warehouseman or other bailee at the time of the sale, the acceptance of a delivery order by the vendee will not amount to an acceptance of the goods until such warehouseman or bailee who is originally the agent of the vendor shall have accepted the delivery order, and thereby assented to hold the goods as the agent of the vendee (*p*). Nor will it make any difference that the document is a delivery warrant indorsed to the vendee (*q*), or that the goods are marked by him (*r*); for the warehouseman's possession is that of the vendor "until an assignment has taken place, and the warehouseman has attorned, so to speak, to the assignee, and agreed with him to hold for him" (*s*).

Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.*, subject to the condition, that if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare, and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do; it was held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to the defendant, and that the delivery of the mare to the defendant took the whole agreement out of the statute (*t*).

If the purchaser of goods draws the edge of a shilling over the hand of the vendor, and returns the money into his own pocket,

(*n*) *Hanson v. Armitage*, 5 B. & A. 557.

(*o*) *Norman v. Phillips*, 14 M. & W. 276.

(*p*) *Bentall v. Burn*, 3 B. & C. 426;
Ry. & M. 107, *S. C.*

(*q*) *Farina v. Home*, 16 M. & W. 119.

(*r*) *Proctor v. Jones*, 1 C. & P. 532.

(*s*) *Per Parke, B.*, 16 M. & W. 123.

(*t*) *Williams v. Burgess*, 10 A. & E.
499; and see *Harman v. Reeve*, 18 C. B.
587.

which is called in the North of England "striking off a bargain," this is not a part payment within the statute (*u*).

Or that some Note or Memorandum in Writing of the Bargain be made.—The memorandum must be made before action brought (*x*). The memorandum need not, however, be the contract itself, for the contract may be made without writing; and if a memorandum in writing be afterwards made embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied (*y*), as between the parties themselves, but it would not be sufficient to bind third parties, *e. g.* it would not be sufficient in an action by the purchaser of goods against a third person who had converted them between the time of the making of the contract and of the drawing up of the memorandum (*z*). But if the original contract is itself in writing, signed by both parties (*a*), that would be the binding instrument, and no subsequent memorandum, signed by one party, could have any effect (*b*). An action on the case was brought against the defendants for not accepting and paying for goods which they had contracted to purchase by the following memorandum in writing: "We agree to give Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete. (Signed) Matthews and Turnbull: and dated 2nd of September, 1803." The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance, and after it was allowed they signed the memorandum again. It was objected, on the authority of *Wain v. Warlters*, that the contract being altogether executory, and no consideration for the promise appearing on the face of the writing, nor any mutuality in the engagement, it was void; but the court overruled the objection on this ground,—that the object and wording of the seventeenth section was different from that of the fourth section, in which the word *agreement* was introduced, and upon which the decision in *Wain v. Warlters* proceeded. And Lord Ellenborough, C. J., observed, that in this case of *Egerton v. Matthews*, the words of the statute were satisfied, if there were some note or memorandum in writing of the *bargain*, signed by the parties to be charged by such contract. And this was a memorandum of the bargain, or at least so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it was all that the statute required (*c*). Assumpsit for goods sold and delivered. Plea, N. A. The plaintiffs, on the 25th January, 1826, had sent from Worcester to the defend-

(*u*) *Blenkinsop v. Clayton*, 7 Taunt. 597.

(*x*) *Bill v. Bament*, 9 M. & W. 36.

(*y*) *Per Patteson, J.*, in *Sievwright v. Archibald*, 17 Q. B. 114.

(*z*) *Felthouse v. Bindley*, 11 C. B. (N. S.) 869.

(*a*) See *post*, p. 811.

(*b*) See (*y*), *supra*.

(*c*) *Egerton v. Matthews*, 6 East, 307.

ant at Derby an invoice of five pockets of hops, and delivered the hops the same day to a carrier to be conveyed from Worcester to Derby, and informed the defendant at the same time that they were so forwarded. The invoice described the plaintiffs as the sellers, and the defendant as the purchaser of the hops. The defendant afterwards wrote to the plaintiffs as follows: "The hops which I bought on the 25th of last month are not yet arrived, nor have I ever heard of them. I received the invoice: the last were much longer on the road than they ought to have been; however, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." It was held, that this was not a sufficient note in writing (*d*), as the note in writing must contain all the terms of the bargain that are to be performed by the defendant (*e*), or be connected with some other document which does (*f*); and parol evidence is admissible to show that the note is defective in this respect (*g*). Several documents, if sufficiently connected, will constitute a good memorandum within the statute (*h*). Where an offer to contract has been made by post, the bargain will be completed on the posting of a letter to the other party accepting his offer, notwithstanding that the letter never reaches its destination (*i*).

The price agreed to be paid constitutes a material part of the bargain; therefore, where a specific price is to be paid, it must be stated in the note or memorandum (*k*); but a written order for goods "on moderate terms," is sufficient (*l*). If no price be agreed upon, the contract will be understood to be for a reasonable price. Hence a contract of sale may be complete and binding, though silent as to price, and also as to time and mode of payment (*m*). Indeed, it would seem that a stipulation merely relating to the mode of payment may, in some cases, be omitted without vitiating the memorandum (*n*).

Signed by the Parties.—The place of the signature is immaterial. If a person draw up an agreement in his own handwriting, beginning, "I, A. B., agree," &c. (*o*), or write in the third person (*p*), the agreement will be considered as sufficiently signed. Where articles of agreement, drawn by the secretary of a com-

(*d*) *Richards v. Porter*, 6 B. & C. 437.

(*e*) *Sarl v. Bourdillon*, 1 C. B., N. S. 196; *Archer v. Baynes*, 5 Exch. 625.

(*f*) *Kenworthy v. Schofield*, 2 B. & C. 947; *Jacob v. Kirk*, 2 M. & Rob. 221; *Ridgway v. Wharton*, 21 L. J., Chan. 46.

(*g*) *Goodman v. Griffiths*, 1 H. & N. 576.

(*h*) *Jackson v. Lowe*, 9 Bingh. 1; *Smith v. Surman*, 9 B. & C. 561; *Saunderson v. Jackson*, 2 B. & P. 238.

(*i*) *Duncan v. Topham*, 8 C. B. 225; *Dunlop v. Higgins*, 1 H. L. Cas. 381.

(*k*) *Goodman v. Griffiths*, 1 H. & N.

574; *Elmore v. Kingscote*, 5 B. & C. 583.

(*l*) *Ashcroft v. Morrin*, 4 M. & Gr. 450.

(*m*) *Valpy v. Gibson*, 4 C. B. 837; *Hoadley v. M'Laine*, 10 Bingh. 482; 4 M. & Sc. 340; and see *ante*, p. 791.

(*n*) *Sarl v. Bourdillon*, 1 C. B., N. S. 191.

(*o*) *Knight v. Crockford*, 1 Esp. N. P. C. 190, *per Eyre*, C. J.; *Holmes v. Mackrell*, 3 C. B., N. S. 789. And see *post*, p. 813.

(*p*) *Lobb v. Stanley*, 5 Q. B. 574.

pany, purported to be made between certain persons whose names were stated at the commencement as the contracting parties, and concluded, "as witness our hands," but was not signed by any of the parties; it was held, not to be sufficiently signed within the statute (*g*). In such cases, however, the question is always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it (*r*). Thus an addition made in the handwriting of the defendant after his signature, for the purpose of correcting a mistake in the original writing and signed by the plaintiff, may be enforced (*s*). So it seems, if a person be in the habit of printing instead of writing his name, he may be said to sign by his printed name, as well as his written name (*t*). In an action for the non-delivery of a quantity of gin, bought of the defendants, it appeared, that at the time the order for the gin was given by the plaintiff to the defendants, a bill of parcels was delivered to the former, the printed part of which was, "London. Bought of Jackson and Hankin, distillers;" and then followed in writing, "1,000 gallons of gin, 1 in 5, gin, 7s.—350l." The name of the purchaser was inserted in the bill of parcels. About a month after, the defendants also wrote the following letter to the plaintiff: "Sir, we wish to know what time we shall send you part of your order, and shall be obliged for a little time in delivery of the remainder: must request you to return our pipes. Yours, &c., Jackson and Hankin." It was held, that by connecting the bill of parcels with the subsequent letter of the defendants the requisites of the statute were sufficiently complied with (*u*). So where the name of the seller was printed on the bill of parcels, but he had written thereon the name of the purchaser; that was held, to be a recognition of the contract and adoption of the printed name, so as to satisfy the words of the statute (*x*). The statute requires the note to be signed by the party to be charged; hence, it will be no objection that it is not also signed by the other party, and, consequently, that there is no remedy against him (*y*). But a note in writing, signed by one party, will be insufficient, unless it also specifies the name of the other party; a signature by the defendant, however, in the plaintiff's order book, on the fly-leaf, at the beginning of which were written the plaintiff's names, will do (*z*). If the note in writing is signed by the seller only, it will plainly be insufficient to charge the buyer (*a*).

(*g*) *Hubert v. Treherne*, 3 M. & Gr. 743; 4 Scott's N. R. 486, *nom. Herbert v. Turner*.

(*r*) *Per Lord Abinger, C. B.*, in *Johnson v. Dodgson*, 2 M. & W. 653.

(*s*) *Bluck v. Gompertz*, 7 Exch. 862. See *Coldham v. Showler*, 3 C. B. 312.

(*t*) *Per Eldon, C. J.*, in 2 B. & P. 239.

(*u*) *Saunderson v. Jackson*, 2 B. & P. 238; and see *Dobell v. Hutchinson*, 3 A.

& E. 372, and *post*, p. 802.

(*x*) *Schneider v. Norris*, 2 M. & S. 286.

(*y*) *Allen v. Bennett*, 3 Taunt. 169; *Egerton v. Matthews*, 6 East, 307. See 5 Taunt. 788, and 17 Q. B. 115.

(*z*) *Sarl v. Bourdillon*, 1 C. B., N. S. 188; *Jacob v. Kirk*, 2 Moo. & Rob. 221. See *ante*, p. 789.

(*a*) *Champion v. Plummer*, 1 B. & P. N. R. 252; and see *Cooper v. Smith*, 15 East, 103.

A written proposal, containing the terms of a proposed contract, signed by the defendant and assented to by the plaintiff by word of mouth, is also a sufficient agreement within the fourth section (b). The defendant purchased leasehold premises at an auction, and signed a memorandum of the purchase on the back of the particulars of sale, containing the name of the owner and the conditions; it was held, that the defendant was bound, although there was not any signature by the vendor (c). In *Boydell v. Drummond* (d), however, it was held, that the signature of the defendant, in a book intituled "Shakspeare Subscribers, their Signatures," not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the Boydell Shakspeare, could not be connected with the prospectus, so as to take the case out of the statute, inasmuch as such connection could not be established without the intervention of parol evidence, and that would open a door for perjury, which it was the object of the statute to prevent (e). Parol evidence, however, is admissible to identify a document containing the terms agreed upon and referred to by the signed writing (f). But where the purchaser of lands by auction signed a memorandum of the contract indorsed on the particulars and conditions of sale, and referring to them, and afterwards he wrote to the vendor, complaining of defect in the title, referring to the contract expressly, and renouncing it; the vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract; it was held, that these letters might be connected with the particulars and conditions of sale, so as to constitute a memorandum in writing, binding the vendor, although neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned, or were signed by, the vendor (g). The signature, it would seem, might be by mark (h).

Or their Agents thereunto lawfully authorized.—A sale of goods by auction is within the seventeenth section of the statute, as a sale of lands by auction is within the fourth section (i); and it has been uniformly held ever since the case of *Simon v. Metivier* (k), that the auctioneer or broker, during the sale, is the agent of both parties, and a memorandum made by him of the bargain, is a suffi-

(b) *Smith v. Neale*, 2 C. B., N. S. 67; *Warner v. Willington*, 3 Drewry, 532; 25 L. J., Chan. 662.

(c) *Laythorp v. Bryant*, 2 B. N. C. 735.

(d) 11 East, 142.

(e) See *Sweet v. Lee*, 3 M. & Gr. 452; 4 Scott's N. R. 77.

(f) *Ridgway v. Wharton*, 27 L. J.,

Chan. 46.

(g) *Dobell v. Hutchinson*, 3 A. & E. 355.

(h) *Baker v. Dening*, 8 A. & E. 94.

(i) *Kenworthy v. Schofield*, 2 B. & C. 945; *Walker v. Constable*, 1 B. & P. 306; ante, p. 784.

(k) 1 Bl. 599; 3 Burr. 1921.

cient compliance with the terms of the statute, to make the contract of sale binding on each (*l*). But the auctioneer does not become the agent of the bidder until the lot is knocked down (*m*), and the moment the sale is over he is no longer the agent of both parties, but of the seller only (*n*). The memorandum by the auctioneer must be a sufficient memorandum; for where, at a sale by auction of sugars, the auctioneer (having before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weights of the sugars; and also another written paper, containing the conditions of sale, which latter he read to the bidders, as the conditions on which the sugars were to be sold; but the two papers were neither externally annexed nor contained any internal reference to each other), wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; it was held, that the minute made on the catalogue of sale (which catalogue was not by any reference incorporated with the conditions of sale), was not a sufficient memorandum of a bargain under those conditions of sale (*o*). Where, however, goods were sold by auction to an agent, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, and the principal, afterwards, in a letter to the agent, recognized the purchase; it was held, that the entry in the catalogue, and the letter coupled together, were a sufficient memorandum of the contract (*p*). But the agent contemplated by the 17th section, who is to bind a defendant by his signature, must be a third person, and not the other contracting party (*q*); and therefore, where an auctioneer wrote down the defendant's name by his authority, opposite to the lot purchased; it was held, that in an action brought in the name of the auctioneer, the entry in such book by the plaintiff, the auctioneer, was not sufficient to take the case out of the statute (*r*). But if the entry be made by the auctioneer's clerk, it will suffice, provided he does not sign as witness only (*s*); for the clerk is not identified with the plaintiff who sues; and in the business which he performs, of entering the name, he is impliedly authorized by the purchaser (*t*). A buyer of goods requested D., the agent of the seller, to write a note of the contract in the buyer's book: D. did so, and signed the note with his own name. It was held, that such note was not sufficient to bind the buyer, inasmuch as D. was not his agent (*u*). If, on the sale by auction of goods, the

(*l*) *Per Ellenborough, C. J.*, delivering the opinion of the court in *Hinde v. Whitehouse*, 7 East, 569; *Emmerson v. Heelis*, 2 Taunt. 38.

(*m*) *Warlow v. Harrison*, 28 L. J., Q. B. 18.

(*n*) *Mews v. Carr*, 1 H. & N. 488.

(*o*) *Hinde v. Whitehouse*, 7 East, 558; *Kennworthy v. Schofield*, 2 B. & C. 945, S. P.

(*p*) *Phillimore v. Barry*, 1 Campb. 513.

(*q*) *Wright v. Dannah*, 2 Campb. 203.

(*r*) *Farebrother v. Simmons*, 5 B. & A. 333.

(*s*) *Gosbell v. Archer*, 2 A. & E. 500.

(*t*) *Bird v. Boulter*, 4 B. & Ad. 443; 1 Nev. & M. 313.

(*u*) *Graham v. Masson*, 5 B. N. C.

same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and although all the lots together purchased by the same person exceed 10*l.* in value, yet if the lots are separately of less value than 10*l.* a memorandum in writing is not necessary (*x*). It seems that the auctioneer may alter the terms of the sale by striking part out of his book before the sale, yet his verbal declarations made at the sale are not evidence to alter the printed conditions (*y*). It is to be observed, that neither the fourth nor seventeenth sections of this statute require that the agent should be authorized *by writing*, differing in this respect from the first and third sections (*z*): a parol authority, therefore, is sufficient (*a*).

When there was evidence of the factor of the plaintiffs, hop merchants, being the agent of both parties, to draw up a record of a contract; it was held, that his writing, "sold to Messrs. E.," the defendants, at the bottom of a counterfoil of the bought note, was a sufficient signature to bind the defendants (*b*).

In like manner, the memorandum in a broker's book, and the bought and sold notes transcribed therefrom, and delivered to the buyer and seller respectively, are sufficient to bind the bargain, the broker being considered the agent of both parties (*c*). The broker being the agent of both parties may, as such, bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the *same* contract for both parties, neither will be bound. And so also if he does not sign the contract really entered into (*d*). Some doubt has been entertained as to whether the entry in the broker's book or the bought and sold notes, constitute the original contract. "Where there has been an entry of the contract by the broker, in his book, signed by him, I," says Lord Campbell, C. J., "should hold without hesitation, notwithstanding some dicta, and a supposed ruling of Lord Tenterden, in *Thornton v. Meux* (*e*), to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him, when sending him a copy of it in the shape of a bought or sold note would not affect its validity. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends bought and sold notes as before. If these agree, they are held to constitute a binding contract; if there be any material

603; 7 Scott, 769. See also *Graham v. Fretwell*, 3 M. & Gr. 368; 4 Scott's N. R. 25; *Dixon v. Broomfield*, 2 Chit. 205.

(*x*) *Emmerson v. Heelis*, 2 Taunt. 38.

(*y*) *Shelton v. Livius*, 2 C. & J. 711. See title, "Auction," and *post*, p. 812.

(*z*) See *ante*, p. 758.

(*a*) *Per Kenyon, C. J.*, in *Rucker v. Cammeyer*, 1 Esp. N. P. C. 106. See also *Emmerson v. Heelis*, 2 Taunt. 46.

(*b*) *Durrell v. Evans*, 31 L. J., Ex. 357, in error.

(*c*) *Rucker v. Cammeyer*, 1 Esp. 105; and *per Lord Ellenborough, C. J.*, in *Hinde v. Whitehouse*, 7 East, 569.

(*d*) *Pitts v. Beckett*, 13 M. & W. 743.

(*e*) M. & M. 43. See *Cumming v. Roebuck*, Holt, 176; *Hawes v. Foster*, 1 Moo. & R. 368; *Townend v. Drakeford*, 1 C. & K. 20.

variance between them they are both nullities, and there is no binding contract" (*f*). It may be considered, then, that the entry in the broker's book is, properly speaking, the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it: a valid contract may be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed, but if the notes are imperfect, an unsigned entry in the book will not supply the defect (*g*).

Hence, where the broker having made a contract, entered it in his book, but did not sign it, and afterwards signed and delivered to the contracting parties bought and sold notes materially differing from each other; it was held, ~~that~~ there was not any valid contract in writing to bind the parties (*h*).

The traveller of the defendant had sold a quantity of tallow to the plaintiff, to be delivered at a certain time. The plaintiff had signed the bought note, and the traveller had signed the sold note for the defendant, and left it with the plaintiff. The tallow not having been delivered at the time specified, plaintiff brought an action and produced in evidence the sold note. The defendant produced in evidence the bought note; between which and the sold note there was a material variance. The plaintiff was nonsuited (*i*). This doctrine renders it essentially necessary that a plaintiff should procure an inspection of the other note, before he can commence his action with safety, unless he has retained a copy. But where a broker made an entry of a contract in his book, which he did not sign, but sent to the vendor and purchaser bought and sold notes copied from the book, and signed by him; it was held, that these were a sufficient memorandum of the bargain, and the parties were bound by the contract so made (*k*).

A material alteration in a sale note by the broker, after the bargain made, at the instance of one of the parties, or by the party himself, without the consent of the other, annuls the instrument, so as to preclude that party from recovering upon the contract, evidenced by the instrument so altered by him (*l*).

Where there is a material variance between the notes, and they are signed, not by the same agent for both parties, but by the contracting parties themselves, or a different agent for each, it will be a question of fact for the jury whether both parties meant the note signed by the defendant to be the contract, in which case

(*f*) In *Siewewright v. Archibald*, 17 Q. B. 124.

(*g*) *Per Abbott, C. J.*, in *Grant v. Fletcher*, 5 B. & C. 437. See *Thornton v. Charles*, 9 M. & W. 802.

(*h*) *Grant v. Fletcher*, 5 B. & C. 436; *Siewewright v. Archibald*, 17 Q. B. 103; *Thornton v. Kempster*, 5 Taunt. 786; *Cumming v. Roebuck*, Holt, 172; *Gregson*

v. Ruck, 4 Q. B. 747; *Cowie v. Renfrey*, 5 Moo. P. C. C. 232.

(*i*) *Smith v. Reynolds*, coram Taunton, J., Somerset Lent Ass. 1831, MS.

(*k*) *Groom v. Aflalo*, 6 B. & C. 117; *Trueman v. Loder*, 11 A. & E. 589.

(*l*) *Mollett v. Wackerbarth*, 5 C. B. 181; *Powell v. Divett*, 15 East, 29.

there will be a sufficient memorandum within the statute; or, whether the defendant never intended to be bound unless the plaintiff should also sign a correlative note to bind him, in which latter case there is no valid contract (*m*).

In the absence of proof of a difference between the bought and sold notes, *either* of them signed by the broker has been held to be a sufficient memorandum of the bargain signed by an authorized agent, and that whether the action be brought by the buyer or the seller (*n*).

Where A. and B. being jointly interested in a quantity of oil, A. entered into a contract for the sale of it without the authority or knowledge of B., who, upon receiving information of the circumstance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees; it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding (*o*). So in *Kinnitz v. Surry*, Paley, Pr. and Ag. 171, n. 3rd ed., where the broker, who signed the broker's note upon a sale of corn was the seller's agent, Lord *Ellenborough* held, that if the buyer acted upon the note, that was such an adoption of his agency, as made the note sufficient within the statute. So where A., without authority, made a contract in writing for the purchase of goods by B., and B. subsequently ratified the contract; it was held, that such ratification rendered A. an agent lawfully authorized within the statute (*p*). A ratification of an agreement under the fourth section made by an agent may be good, notwithstanding that the principal was not made acquainted with all the terms (*q*).

On the Effect of Parol Evidence of a Variation or Waiver of a Written Contract.

The question as to the admissibility of parol evidence to vary or annul a written contract, has recently been before the courts on several occasions. The judgments then delivered, which show that there is a distinction in this respect between contracts which do, and contracts which do not, come within the Statute of Frauds, render it unnecessary to insert the earlier decisions. By an agreement in writing, the plaintiff contracted to sell the defendant several lots of land, and to make a good title to them; and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots; and it was then verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase-money,

(*m*) *Moore v. Campbell*, 10 Exch. 323.

(*n*) *Parton* app. v. *Crofts* resp., 16 C. B. (N. S.) 11.

(*o*) *Sormes v. Spencer*, 1 Dow. & Ry. 32.

(*p*) *Maclean v. Dunn*, 4 Bingh. 722. See *Gosbell v. Archer*, 2 A. & E. 500; 4 Nev. & Mann. 485.

(*q*) *Fitzmaurice v. Bayley*, 6 E. & B. 868.

the declaration stated, that the plaintiff agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same. Lord *Denman*, C. J., in delivering the opinion of the court, observed, that after an agreement not coming within the statute "has been reduced into writing, it is competent to the parties, at any time before breach of it by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to (*r*), or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement." And his lordship, after reading the fourth section, said: "It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waiver and abandonment of the whole written agreement, but only a part of it; and the question is, what is the effect of that? It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid; and that it is only an abandonment of a collateral point. But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But, in the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract, for if there be not a good title the land may, in some instances, better not be conveyed at all; but our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in

(*r*) See *Jeffrey v. Walton*, 1 Stark. 267.

writing." A rule *nisi*, which had been obtained for entering a nonsuit, was accordingly made absolute (s).

In a subsequent case (t), the written agreement was, that the plaintiff should grant a lease to the defendants, and the defendants should take certain quantities of straw and other things at a valuation, to be made by persons named respectively by plaintiff and defendants, or their umpire, in the usual way, and the defendants entered under the agreement, and took possession of the straw, &c. A parol agreement was afterwards entered into, that the valuation should be made by one D. The defence set up to an action to recover the amount of D.'s valuation was, that no valuation had been made pursuant to the original agreement. It was held, on demurrer, that, although the part of the written agreement which was varied by parol might have been good of itself without writing by reason of the acceptance of the straw, &c., yet it was not competent to the parties, by agreement not in writing, to separate into two parts the subject-matters of the original agreement, and to substitute a new agreement, not in writing, as to the straw, &c.; and judgment was given for the defendants. In deciding this case, the court adverted to *Goss v. Lord Nugent* (u), as a case in which it was doubted whether it was competent to the parties to waive and abandon an agreement in writing by parol, but expressed no direct opinion on the subject (x).

In another case, the plaintiff brought his action to recover the deposit paid by him on entering into a written contract, by which the defendant agreed to sell the lease of a house and deliver possession by a day named. It appeared, at the trial, that on that day neither of the parties were in a situation to carry the contract into effect, but within a reasonable time afterwards the obstacles might have been removed; but before that time arrived, the plaintiff insisted that the contract was at an end, and demanded the return of the deposit. The count, upon which the court held the plaintiff might recover, was one for money had and received. *Tindal*, C. J., in delivering the opinion of the court, stated (y) that the question was, "Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? We are of opinion that it cannot. This is an agreement for the sale of land, upon which, by the Statute of Frauds, sect. 4, no action can be brought, 'unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorized.' Now we cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent parol agreement between the parties to

(s) *Goss v. Lord Nugent*, 5 B. & Ad. 58.

(t) *Harvey v. Graham*, 5 A. & E. 61.

(u) 5 B. & Ad. 58.

(x) *Stowell v. Robinson*, 2 B. N. C.

928; 5 Scott, 196.

(y) 3 B. N. C. 937.

that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds." So an agreement to pay a clerk a salary yearly for a series of years cannot be altered by a subsequent verbal agreement to pay the salary quarterly (z). So, also, where premises have been let by a written agreement a subsequent verbal agreement to reduce the rent is inoperative (a). But where premises have been let by a written agreement *for a term not exceeding three years from the making*, a subsequent verbal agreement to substitute other premises for those originally let will be upheld; since the taking of the second set of premises is a new demise by parol upon the terms of the first written contract, and not an alteration of the terms of that contract (b).

In the following case (c) the declaration *in assumpsit* stated, that plaintiff agreed to buy, and defendant to sell, a cargo, to be delivered "on the 20th to the 22nd instant," to be paid for by an acceptance three months from delivery; and that afterwards, before the 22nd, plaintiff, at request of defendant, gave time for the delivery to the 24th: breach, that defendant, though requested (to wit, on 24th), to deliver, had not, on 24th or any other time, delivered: special damage by rise of price between the agreement and breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above 10*l.*; and that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract, &c. It appeared that there was a written contract, as stated in the declaration, for the delivery, "on the 20th to the 22nd," but the 22nd falling on Sunday, plaintiff, at defendant's request, verbally agreed to enlarge the time to the 23rd or 24th. The price fluctuated between the time of the agreement and the 24th, being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance. It was held, that on these facts, defendant was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, and not merely a dispensation from performance on a particular day. The judgment of the court, delivered by Lord Denman, contains the following passage, which appears, however, to apply more accurately to the fourth than to the seventeenth section:—"It was urged by the plaintiff's counsel, that the defendant's argument reduced him to an inconsistency: that he alleged, on the one hand, an alteration of the contract by parol,

(z) *Giraud v. Richmond*, 2 C. B. 835.

(a) *Crowley v. Vitty*, 7 Exch. 319.

(b) *Giles v. Spencer*, 3 C. B., N. S. 250.

(c) *Stead v. Dawber*, 10 A. & E. 57;
2 P. & D. 447, overruling *Cuff v. Penn*,
M. & S. 21.

and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal, by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties; but the statute intervenes, and, in the case of such a contract, takes away the remedy by action."

Plaintiff entered into a written agreement with the defendant, for the purchase of a cargo to be shipped on board a vessel on her next arrival at a certain port. On the arrival of the vessel, the defendant verbally requested a postponement of the shipment, until she should have completed another voyage. Plaintiff assented to this proposal, and the voyage was made. The defendant, on the second arrival of the vessel, declined taking the goods, which were resold by the plaintiff, who brought his action to recover the loss sustained by the defendant's non-performance of the contract. It was held, that the plaintiff could not recover. *Parke*, B., said, "Here there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, whether such an alteration, by parol, of the written contract, can be binding. It appears to me that it cannot; and that the same rule must prevail as to the construction of the 17th section, which has already prevailed (*d*) in the construction of the 4th section." "It appears to me that no distinction can be made; and that it is unnecessary to inquire, what are the essential parts of a contract, and what not; and that every part of the contract, in regard to which the parties are stipulating, must be taken to be material" (*e*). So where goods above the value of 10*l.* have been sold under a written contract, a subsequent parol agreement to alter the mode of delivery (*f*) is inoperative. So also parol evidence of a previous course of dealing between the parties is not admissible to qualify the terms of the writing (*g*); but where an agreement is expressed in short and incomplete terms, parol evidence is admissible to explain that which was *per se* unintelligible, provided such explanation is not inconsistent with the terms used (*h*).

Where a contract in writing, whether within the Statute of Frauds or not, is made by an agent in his own name, on behalf of an undisclosed principal, parol evidence is always admissible, so as to give

(*d*) *Goss v. Lord Nugent*, 5 B. & Ad. 58.

(*e*) *Marshall v. Lynn*, 6 M. & W. 109.

(*f*) *Moore v. Campbell*, 10 Exch. 323; *Noble v. Ward*, 2 L. R. 135 Ex.

(*g*) *Ford v. Yates*, 2 Scott, N. R. 645; 2 M. & G. 549. As to the admissibility of evidence of custom of trade to

explain or annex terms, see *Brown v. Byrne*, 3 E. & B. 702; *Syers v. Jonas*, 2 Exch. 111; *Phillipps v. Briard*, 1 H. & N. 21; *Cuthbert v. Cumming*, 10 Exch. 809; *Humfrey v. Dale*, 7 E. & B. 267; (*in error*) 27 L. J., Q. B. 390.

(*h*) *Sweet v. Lee*, 3 M. & G. 452. See *Shore v. Wilson*, 9 Cl. & F. 365.

the benefit of the contract to the unnamed principal, or to charge him with liability thereon, but never for the purpose of discharging the agent (*i*). And where brokers signed a note in the following form, "sold for Messrs. T. to our principals, &c.," it was held that evidence of a custom in the trade, that when a broker purchased without disclosing his principal, he was himself liable to be looked to as purchaser, was admissible, notwithstanding the Statute of Frauds (*j*), for, "where by any rule of law, or by the usage of any trade, the terms of a contract acquire a particular meaning, the contract must be taken to express that meaning as much as though it had been set forth *in extenso*" (*k*).

Parol evidence, however, may be given to show that a document signed by the parties, and purporting to be an agreement between them, was not to operate as an agreement at all until something further should happen or be done, as the payment of money, or the obtaining the consent of a third person (*l*). So an agent may, as an equitable defence to an action on a contract which describes him as principal, show that it was expressly agreed that he was not to be liable, and that the document was signed by a mutual mistake as to its effect (*m*). So it is admissible to show that a written contract, which bears no date, was intended to operate, not from its execution, but from a future uncertain period (*n*). But where land is occupied under a written agreement, parol evidence of an understanding between the parties that the rent was to commence from a day later than that named in the writing is inadmissible (*o*).

Again, parol evidence is admissible to show that a writing given in evidence and signed by the defendant alone, does not contain all the terms agreed upon, and, consequently, that it does not constitute a sufficient memorandum within the 17th section (*p*); and if there has been an acceptance of the goods, or part payment to take the sale out of the statute, such writing will not exclude parol evidence of the omitted terms, which will in that case be binding on the parties (*q*). If the supposed contract, however, is reduced to writing, and is signed by both parties, or the note in writing of one party has been adopted by the other, the writing alone will bind them, notwithstanding that the contract may have been originally completely entered into by parol, and some of the terms agreed on are omitted from the writing (*r*).

(*i*) *Higgins v. Senior*, 8 M. & W. 834; *Carr v. Jackson*, 7 Exch. 382; *Schmalz v. Avery*, 16 Q. B. 655; notes to *Thompson v. Davenport*, 2 Sm. Lead. Ca. 303; *Lanning v. Cooke*, 1 F. & F. 9; *Humble v. Hunter*, 12 Q. B. 655.

(*j*) *Humfrey v. Dale*, 7 E. & B. 266; affirmed (*in error*) 27 L. J., Q. B. 390.

(*k*) *Per Cockburn*, C. J., in *Humfrey v. Dale*, 27 L. J., Q. B. 396.

(*l*) *Pym v. Campbell*, 6 E. & B. 370.

See *Gudgen v. Bessett*, *ibid.* 986, and *Murray v. Earl of Stair*, 2 B. & C. 82.

(*m*) *Wake v. Harris*, 1 H. & C. 206.

(*n*) *Davis v. Jones*, 17 C. B. 625.

(*o*) *Henson v. Coope*, 3 Sc. N. R. 48.

(*p*) *Goodman v. Griffiths*, 1 H. & N. 576.

(*q*) *Lockett v. Nicklin*, 2 Exch. 93.

(*r*) *Harnor v. Groves*, 15 C. B. 674; *Smith v. Jeffries*, 15 M. & W. 561.

It is clear that the printed particulars of a sale, which have been signed by the auctioneer to satisfy the statute, cannot be varied by his verbal statements at the time of the sale (*s*), but where the sale is of goods of less value than 10*l.*, and there is no signature, evidence of a statement by the auctioneer at variance with the catalogue posted up in the room is admissible (*t*).

III. *The Fifth and Sixth Sections, relating to the Execution and Revocation of Wills.*

Stats. 7 Will. IV. & 1 Vict. c. 26, and 15 Vict. c. 24, for the Amendment of the Laws with respect to Wills.

The sections of the Statute of Frauds relating to wills have been repealed, as to all wills made since 31st Dec. 1837, by the stat. 7 Will. IV. & 1 Vict. c. 26, s. 2 (*u*); although the law of wills made since that date does not come within the title "Statute of Frauds," yet it has been thought advisable to insert the new statutes in this section.

First, *As to Wills made before 1838.*

5th Section of the Statute of Frauds.—"All devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by the custom of Kent, or of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

"All facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will" (*x*).

All Devises of any Lands or Tenements.—Although these words are very general, and extend to customary freeholds (*y*), not passing by surrender, yet it has been held, that copyhold land (*z*), and customary (*a*) estates, passing by surrender, are not comprehended within them. In these cases, the estate is considered as passing

(*s*) *Shelton v. Iivius*, 2 C. & J. 411.

(*t*) *Eden v. Blake*, 13 M. & W. 614.
See *ante*, title, "Auction."

(*u*) See *post*, p. 823.

(*x*) *Per Parke, J.*, *Doe d. Templeman v. Martin*, 4 B. & Ad. 785.

(*y*) *Hussey v. Grills*, Amb. 299.

(*z*) *Doe d. Reed v. Harris*, 8 A. & E. 1; *Roe d. Gilman v. Heyhoe*, 2 Bl. R.

1114. See, also, *The Attorney-General v. Barnes*, 2 Vern. 598; *Attorney-General v. Andrews*, 1 Ves. sen. 225; *Tuffnell v. Page*, 2 Atk. 37.

(*a*) *Doe d. Cook v. Danvers*, 7 East, 299; *Carey v. Askew*, 2 Bro. C. C. 58, and in a note to *Wagstaff v. Wagstaff*, 2 P. Wms. 259, Cox's ed., recognized by *Ellenborough, C. J.*, in 7 East, 324:

by the surrender of which the will only directs the uses. Consequently, it is not necessary that such will should be executed with the solemnities required by this statute. Hence, a mere draught of a will, the signing and publication of which were prevented by the sudden death of the testator, has been held sufficient to pass copyhold land surrendered to the use of the will. *Note.* By stat. 55 Geo. III. c. 192, dispositions by will, by any person dying after 12th July, 1815, of copyhold estates, are made effectual without any previous surrender to the use thereof. But this statute only supplies the want of a formal surrender, and does not extend to a case where the surrender is a matter of substance, as where it is required to be accompanied by the separate examination of wife (*b*). Since this statute, a copyhold will pass (*c*) under a general devise of real estate, although there be no surrender to the use of the will. But the will must contain a disposition of the copyhold, either expressed or implied (*d*). The statute applies to wills made before the statute, as well as those which were made after (*e*). An heir at law, who has not been admitted to a copyhold estate, which has descended to him, nor paid the lord's fine due on admission, may, notwithstanding, devise the same (*f*). No presumption will be made against the right of a party to devise his copyhold estate (*g*).

Shall be in Writing.—This provision is merely a repetition of what had been required by the stat. 32 Hen. VIII. c. 1, which first gave power of disposing of land by will. But writing was the only solemnity which that statute required. Hence, before the Statute of Frauds, short notes, taken by a lawyer from the testator's mouth, for the purpose of being reduced into form, were held to be a good will, though the testator died before they were so reduced into form (*h*). In like manner, a scrap of writing, though it was not signed, sealed, or written by the testator, might have been established as a will by the testimony of a single witness. This did, in fact, happen in a very remarkable case, that of Sir *Francis Worsey*'s will (*i*).

And signed by the Party devising.—What shall be considered as a sufficient signature within this clause, will appear from the following cases:—The deviser wrote his will with his own hand, thus: "I, John Stanley, make this my last will and testament;" and thereby devised the land in question, and put his seal thereto, but did not subscribe his name. The will was subscribed by three

(*b*) *Doe d. Nethercote v. Bartle*, 5 B. & Ad. 492.

(*c*) *Doe d. Clarke v. Ludlam*, 7 Bingh. 275.

(*d*) *Doe v. Bird*, 5 B. & Ad. 695.

(*e*) See the words.

(*f*) *Right v. Banks*, 3 B. & Ad. 664.

(*g*) *Doe d. Dand v. Thompson*, 10 Jur.

28; 15 L. J., Q. B. 88, *S. C.*

(*h*) 1 Anderson, 34, cited by Lord Ellenborough, C. J., 7 East, 324.

(*i*) Reported in 1 Sidf. 315, pl. 33; 2 Keb. 128, pl. 82, by the name of *Stevens, Lessee of Gerrard v. Lord Manchester*, 18 Car. II.

witnesses in his presence. This was held to be a good will to pass the land; for the will having been written by the deviser, and his name being in the will, it was a sufficient signing within the statute, which has not appropriated any particular place in the will where it shall be signed, either at the top or bottom, or in the margin (*k*). A mark made by the deviser will be a sufficient signing within the statute, even though his hand be guided (*l*). In such case, it is immaterial whether the deviser can write at the time or not, and no collateral inquiry of that sort ought to take place (*m*). So it has been held, that a will was duly executed to pass freehold land, although one witness only had subscribed his *name* and the other two had set their marks (*n*). So, under the Wills Act, attestation by initials will suffice (*o*), or by a wrong name (*p*), or where the hand is guided (*q*). Whether the deviser, by merely affixing his seal to the will, can be considered as having sufficiently signed within the meaning of the statute, seems to have been a *vexata quæstio* (*r*).

Attested and subscribed.—The use of the word “subscribe,” in the statute, does not make it imperative on the witnesses to *sign* under the signature of the testator. The requisition is complied with by the witnesses who saw the will executed by the testator immediately signing their names *on any part of it*, at his request, with the intention of attesting it (*s*).

A will more than thirty years old proves itself, without calling any witnesses, even where they are all alive (*t*). A will was dated

(*k*) *Lemayne v. Stanley*, 3 Lev. 1; adjudged after several arguments by the whole court, *North*, C. J., *Wyndham*, *Charlton*, and *Levinz*, Js., on special verdict in ejectment, Easter T. 1681, C. B. See *Right v. Price*, Dougl. 241.

(*l*) *Wilson v. Beddard*, 12 Sim. 28; *Re Bryce*, 2 Curt. 325.

(*m*) *Baker v. Dening*, 8 A. & E. 94; 3 N. & P. 228. See *Lemayne v. Stanley*, Freem. 538.

(*n*) *Harrison v. Harrison*, 8 Ves. jun. 185, decided by Lord Eldon, C., on the authority of *Gurney v. Corbet*, C. B., 9 Burnet, 138; Serjt. Hill's MSS., vol. 30, p. 51. See, also, *Addy v. Grix*, coram Sir W. Grant, M. R., 8 Ves. 504; *Doe d. Davies v. Davies*, 9 Q. B. 648; *Doe d. Counsell v. Caperton*, 9 C. & P. 112; *Re Amiss*, 2 Rob. Ecc. R. 116.

(*o*) *Re Savory*, 15 Jur. 1042; *Re Christian*, 2 Rob. Ecc. R. 110.

(*p*) *Re Redding*, 14 Jur. 1052; 2 Rob. 339, S. C.; *Re Glover*, 11 Jur. 1022.

(*q*) *Harrison v. Elwin*, 3 Q. B. 117.

(*r*) Affirmed *per North*, *Wyndham*, and *Charlton*, in *Lemayne v. Stanley*, 3 Lev. 1, dub. *Levinz*, J. Affirmed *per Holt*, C. J., in *Lee v. Libb*, 1 Show. 69.

Affirmed *per Lord Raymond*, C. J., at *Nisi Prius*, in *Warneford v. Warneford*, 2 Str. 764. Negatived *per* three Barons (including *Parker*, C. B.), in *Smith v. Evans*, 1 Wils. 313; also *per Willes*, C. J., Sir *John Strange*, M. R., and *per Parker*, C. B., sitting with Lord *Hardwicke*, C., in *Ellis v. Smith*, as assistants, 1 Ves. jun. 11; 1 Dickens, 225. *Parker*, C. B., observed, however (according to the report in 1 Ves. jun. 12), that, as in some cases it was thrown out *obiter*, that sealing was signing, and *in one case decreed*, that it was equal to signing, he should submit his opinion. But in Dickens's Rep. of *Ellis v. Smith*, vol. i., p. 228, and in a MS. note, this remark does not appear; and *Parker's* dissent from the opinion of the three judges in *Lemayne v. Stanley*, and Lord *Raymond* in *Warneford v. Warneford*, stands unqualified; but Lord *Eldon*, in *Wright v. Wakeford*, 17 Ves. 458, says expressly, that sealing without signing is not sufficient.

(*s*) *Roberts v. Phillips*, 4 E. & B. 450, 459.

(*t*) *Per Cur.*, *Doe d. Spilsbury v. Burdett*, 4 A. & E. 19.

more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living ; it was held, that it was not necessary to call such witness to prove the execution, although the devisor had died within thirty years (*u*). In case then of a will made previously to 1838, if it appear that the will comes from such custody as is sufficient to afford a reasonable presumption in favour of its genuineness (*x*), and that is otherwise free from suspicion (*y*), then if it appear to fulfil the requirements of the Statute of Frauds, it will, being more than thirty years old, prove itself.

6th Section.—"No devise, in writing, of lands, tenements, or hereditaments, nor any clause thereof, shall be revocable otherwise than by some other will or codicil, in writing, or other writing declaring the same ; or by burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence, and by his directions and consent ; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his directions, in manner aforesaid ; or unless the same be altered by some other will or codicil, in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same."

No Devise in Writing, of Lands, &c., shall be revocable, otherwise than by some other Will or Codicil, in Writing ; or other Writing of the Devisor, signed in the Presence of three or four Witnesses declaring the same.—Having premised that, before this statute, devises of lands, made under the particular customs of boroughs, or by virtue of the Statute of Wills, (32 Hen. VIII. c. 1,) might have been revoked by any *express* words without writing (*a*), the Statute of Wills having given power to any person seised in fee of lands, to devise such lands by will *in writing*, but being silent as to revocations, let us proceed to consider the several methods prescribed by the Statute of Frauds for the revocation of wills of lands, and then subjoin some remarks on implied revocations. This section prescribes three methods, by which a devise of lands may be revoked ; either by another will or codicil in writing, or by other writing, declaring the intention of the devisor to revoke the former devise ; or by burning, cancelling, &c. With respect to the first method, (the only subject now under consideration,) it is to be observed that the words "signed in the presence of three or four witnesses," having been held to refer to the next preceding words, "*other writing*" only, and not to the words "*will or codicil in writing*," it is not necessary that a *will*, whereby a former will is revoked, should be signed by the devisor

(*u*) *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

(*x*) *Bishop of Meath v. M. of Winchester*, 3 Bing. 291.

(*y*) *Roe v. Rawling*, 7 East, 291.

(*a*) *Dyer*, 310, b. pl. 81. *Adm. in Symson v. Kirton*, Cro. Jac. 115, and *Cranvell v. Sanders*, Cro. Jac. 497 ; *Gilb. Dev.* 93, ed. 1739.

in the presence of three witnesses (*b*); but that a second will may operate as a revocation of a former, it is necessary, 1. That the second will should expressly revoke or be clearly inconsistent with the first devise, *quoad* the particular subject matter of such devise (*c*). If it be merely found, that another or even a different disposition has been made by the testator from that which he had first willed, yet if it do not appear to the court, what that difference is, it will not be a revocation (*d*). And the general rule is, that a revocation by subsequent will or codicil, whether by express words of revocation or by devise inconsistent with the former devise, shall operate only so far as is necessary to effectuate the intention of the testator (*e*). 2. It is necessary that the second will should be subsisting and effective at the time of the death of the testator; consequently, if the second will be not executed with the formalities prescribed by the fifth section of the statute (*f*), or if the second will be effectually cancelled in the lifetime of the testator (*g*), the first will shall operate as if no other had existed. 3. As, before the Statute of Frauds, parol declarations of an intention to revoke in future were held not to amount to a present revocation (*h*); so, since the statute, such declaration, although executed with the formalities required by the statute, will not operate as a revocation (*i*). 4. It is an established principle, that an instrument, which is intended to operate as a devise, if it cannot take effect as such, shall never operate as a revocation (*k*). Where an effective devise appears to have been once made in disherison of the heir at law, it will lie upon the heir to prove, that such devise has been effectively defeated (*l*).

Or other Writing of the Devisor declaring the same signed in the Presence of three or four Witnesses.—An instrument of revocation, intended merely to operate as such, and not as a devise, would, according to the opinion of Lord Cowper, C., in *Onions v. Tyrer*, 1 P. Wms. 345, Cox's edit., be effective, if signed by the devisor in the presence of three witnesses, as this clause directs, and without the other formalities required in the case of wills by

(*b*) See *Hoil v. Clerk*, 3 Mod. 218, recognized by Ld. Hardwicke, Ch., in *Ellis v. Smith*, 4 Burn. E. L. 199.

(*c*) See Cox's note to *Onions v. Tyrer*, 1 P. Wms. 345.

(*d*) *Hitchins v. Basset*, Salk. 592; 1 Show. 537; 3 Mod. 203; Show. P. C. 146; *Harwood v. Goodright*, Cowp. 87; *S. C.* in C. B., 3 Wils. 497; 2 Bl. R. 937, and in Dom. Proc. 7 Bro. P. C. p. 344, but in Tomlins' edit. p. 489; *Thomas v. Evans*, 2 East, 488.

(*e*) *Duffield v. Duffield*, 3 Bligh, N. S. 260; *Doe d. Evers v. Ward*, 18 Q. B.

223; *Plenty v. West*, 16 Beav. 173; 22 L. J., Chan. 185; *Stoddart v. Grant*, 1 Macq. H. L. Cas. 163; *Darley v. Martin*, 13 C. B. 683.

(*f*) *Eccleston v. Speke*, 1689, Carth. 81; *Onions v. Tyrer*, 1716, 1 P. Wms. 344.

(*g*) *Goodright v. Glazier*, 4 Burr. 2512.

(*h*) *Cranvell v. Sanders*, Cro. Jac. 497.

(*i*) *Thomas v. Evans*, 2 East, 488.

(*k*) *Exp. Earl of Ilchester*, 7 Ves. jun. 348.

(*l*) Cowp. 87.

the fifth section, *viz.* the attestation and subscription of the witnesses in the presence of the devisor.

Method of express Revocation. By burning, &c. Or by cancelling, tearing, or obliterating the same, by the Testator himself, or in his Presence, and by his Directions and Consent.—The acts here mentioned are in themselves equivocal acts: and, consequently, in order to make them operate as revocations, it must be shown that they were done *animo revocandi*, that is, with an intention to revoke: for, unless that appears, the prior devise will not be revoked. Hence, if the devisor were to throw his ink upon his will, instead of the sand; though it might be a complete defacing of the instrument, it would not be a revocation (*m*); or suppose a person having two wills of different dates by him, should direct the first will to be cancelled, and, through mistake, the person to whom the devisor gave his directions should cancel the last will; such an act would not be a revocation of the last will: or, suppose a person having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would not be a revocation of the devises contained in such parts. The intention, therefore, must govern in such cases. A., by will, duly executed and attested (*n*), devised land to trustees to several uses; and at the same time executed a duplicate thereof, with all the solemnities prescribed by the fifth section of this statute. Some time after, having been desirous to change one of his trustees, he ordered his will to be written over again, without any variation from the first except only in the name of that trustee, and a clause revoking all former wills. When it was so written over he executed it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence (as the fifth section directs). Some evidence was adduced that the testator afterwards cancelled the duplicate of the first will, by tearing off the seal. The question was, whether the cancelling the duplicate of the first will should be a revocation thereof within this clause. It was admitted, that if a devisor, having duplicates of his will, cancels one of them *animo revocandi*, this is a good revocation of the whole will, and of both the duplicates (*o*). But it was decreed in the present case (*p*), that it was plain the testator did not mean to revoke his former will by cancelling, but by substituting another perfect will in lieu thereof, and not otherwise; and, therefore, the cancelling

(*m*) *Per* Lord Mansfield, C. J., in *Burtenshaw v. Gilbert*, Cowp. 52.

(*n*) *Onions v. Tyrer*, 2 Vern. 741; *Prec. in Chan.* 459; *Gilb. Rep.* 130; 1 *Eq. Ca. Abr.* 407, pl. 1; but best reported in *P. Wms.* vol. 1, p. 344, *Cox's* edit.

(*o*) "Where there are duplicates of a will, one in the possession of the devisor,

the other not: and the devisor cancels that which is in *his* custody, it is an effectual cancelling of both." *Per* Aston, J., in *Burtenshaw v. Gilbert*, Cowp. 54; *Doe d. Strickland v. Strickland*, 8 C. B. 724.

(*p*) *Reg. Lib. B.* 1716, fol. 242; *Cox's P. Wms.* vol. 1, p. 345.

thereof (if any) was but a circumstance showing that he thought he had made a good disposition by the second will, and in confidence thereof it was done with no other intent, but that the second will should thereby more surely take place. The cancelling of a will under this section may be proved in any manner consistent with the general law of evidence, the statute not introducing any new rule of proof (*q*). In order to effectuate a revocation, it is not necessary that the will should be actually destroyed: hence a slight *tearing of a will* and throwing it on the fire, with a deliberate intent to consume it, by the testator, though it fell off, and was preserved by a bystander without his consent or knowledge, has been held to be a sufficient revocation (*r*). But where a testator, intending to destroy his will, threw it upon the fire, and another person snatched it off, a corner of the envelope only, and no part of the will itself being burnt; it was held, that the will was not revoked as to the freehold (*s*), but as to the copyhold, to which the Statute of Frauds does not extend, it was revoked by the attempt to burn (*t*). A. having made a will of land, and a duplicate thereof (both duly executed and attested), but declaring that it was not a will to his liking, and that he should alter it, delivered a duplicate to B. (a devisee named therein). Afterwards A. executed another will, disposing of his estate in a different manner from what he had done under the former will, and thereby revoked all former wills, and at the same time cancelled the first will, which remained in his own custody, observing to the person who made the second will, that there was a duplicate of the first will in the hands of B. A short time before A.'s death, one of the principal devisees in the last will died; whereupon A. sent for an attorney to prepare another will, but, before the attorney arrived, A. became senseless, and shortly afterwards died. After his death, the first and second wills were found together in a paper, both cancelled, but the duplicate of the first will (which duplicate had been delivered to B.) was found among some deeds and papers of the testator *uncancelled*. It did not appear how the duplicate came to be found among the testator's papers. It was held, that at the time of making the second will, the first was clearly revoked, and that it was not set up again by cancelling the second will (*u*). The testator, after devising all his land to trustees upon trust to sell, "except the house at Bath," gave to his wife his house in Bath for her life, and after her death to his eldest son; and after the execution of the will sold his house at Bath, and struck out of his will the exception and the devise respecting it. It was held, that the devise to the trustees was not revoked by the

(*q*) *Doe d. Reed v. Harris*, 6 A. & E. 209; 1 Nev. & P. 405.

(*r*) *Bibb d. Mole v. Thomas*, 2 Bl. R. 1043. But see the 20th section of the new act, 1 Vict. c. 26, *post*, p. 826.

(*s*) *Doe d. Reed v. Harris*, 6 A. & E. 209; 1 Nev. & P. 405.

(*t*) *Doe d. Reed v. Harris*, 8 A. & E. 1.

(*u*) *Burtenshaw v. Gilbert*, Cowp. 49.

erasure as to the house at Bath (x). So where a testator, by will duly executed and attested, devised lands to A. and B., as joint-tenants in fee, and afterwards struck out the name of B. by drawing a pen through it. It was held, that the erasure was to be considered as a revocation of the devise *pro tanto* only (y). A., by will, duly executed and attested, devised land to B. and C. in trust, and afterwards struck out the name of C., and inserted the names of D. and E., leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not republish his will. It was held, that the intent of the testator appeared to be to revoke by the substitution of another good devise to the new trustees and not by the obliteration; but such devise not having been executed with the proper solemnities, would not operate as a revocation; and, admitting that the obliteration of the name of C. would have revoked the devise to C., yet the heir could not recover, inasmuch as the devise to B. remained unrevoked, and competent to sustain all the trusts in the will in exclusion of the heir (z).

Implied Revocations.—Although the section of the Statute of Frauds now under review has enumerated several methods by which a devise of lands may be revoked, and although it should seem to have been the intention of the legislature to have excluded every other method of revocation, yet it has been held, that implied revocations are not within the statute. Implied revocations strictly so termed, are, 1st, when certain acts are done by the testator, inconsistent with or contradictory to the dispositions made by the will, so necessarily inferring an intention to revoke, that the law will presume such an intention. As where the deviser, by a subsequent deed, gives the devisee in fee a lesser interest, *e. g.* an estate for years, to commence after the death of the deviser: in such case the intended devisee cannot have both interests; that which is conveyed by the deed must take effect, and, therefore, the law makes a necessary implication, that the first disposition, which is by the will, is revoked (a). In like manner, where the deviser, having devised a reversion to A., afterwards grants the same to B., this will be a revocation, even though the lessee has not attained. So where the testator, having devised land to A., bargains and sells the same land to B., although the deed be not

(x) *Sutton v. Sutton*, Cowp. 812. If A. by his will devises all the residue of his personal estate to B. and C., and makes them executors; and after, by a codicil, cancels and revokes everything relating to B., and also revokes the appointment of B. as executor, C. shall have the whole. A revocation, without a new gift, shall have the same effect as if it had been expressly given; and whether it be by codicil or obliteration, it is the same. *Humphries v. Taylor*, in Canc. Hil. 25 Geo. II., 7 Bac. Abr. by

Gwillim, p. 363.

(y) *Larkins v. Larkins*, 3 B. & P. 16. A mere change of trustees will not revoke a prior devise of the equitable estate. *Willett v. Sandford*, 1 Ves. 178, 186; *Doe v. Pott*, Doug. 710; *Watts v. Fullarton* (cited) Doug. 718.

(z) *Short d. Gastrell v. Smith*, 4 East, 419.

(a) *Coke v. Bullock*, Cro. Jac. 49, cited in *Harkness v. Bayley*, Pr. Ch. 514, and 2 Atk. 72.

inrolled within six months, according to the statute, and, consequently, nothing can pass to the bargainee, yet this will amount to a revocation, because here is a solemn act done, whereby the testator has clearly evinced his intention, that the devisee should not have the land devised (*b*). 2. It has been held, that revocations are necessarily to be implied or presumed, from a total change in the circumstances of the testator's family after the execution of the will. This head of revocation was originally borrowed from the civil law, and applied in the first instance to bequests of personal estate (*c*), and afterwards extended to devises of land, such revocation not having been considered as excluded by the provisions of the sixth section of the Statute of Frauds. What changes or alteration in the circumstances of the testator will be sufficient to work a revocation of a devise of land, may often be difficult to decide. By the common law, before the Statute of Frauds, a subsequent marriage was held to revoke a will of land made by a feme sole; although such marriage was had with the person in whose favour the will was made (*d*). Since the statute, an opinion was expressed in *Brown v. Thompson*, at the Rolls, 8 Dec. 1731, by Sir John Trevor, M. R., and afterwards in the same case by Lord Keeper Wright (*e*), that revocations of a devise of land might be implied from subsequent marriage and birth of a child, notwithstanding the provision of the sixth section of the Statute of Frauds; but this point was not considered as settled until the case of *Christopher v. Christopher* (*f*), when it was solemnly determined by Adams, B., Smythe, B., and Parker, C. B., against the opinion of Perrot, B., who thought the case within the statute, and that the dispute concerning the reality of a subsequent marriage, and the legitimacy of children, was as open to perjury as any other, and that the statute intended an actual and not a presumptive revocation. The case of *Christopher v. Christopher* has been recognized in several subsequent cases (*g*). Marriage alone, or the subsequent birth of children unprovided for alone, is not sufficient to operate as a revocation of a will of personal estate (*h*), nor of real estate (*i*). It has been solemnly determined that a subsequent marriage, and the birth of a child, without provision

(*b*) I am not aware that the two last-mentioned instances have ever been solemnly decided. They are mentioned in 1 Roll. Abr. 615 (P.) pl. 5, 6, as the opinions of Popham and Gawdy, Js.; but, from subsequent cases, where they have been cited, it appears that they have been considered as law. Gilbert has inserted them in his Treatise on Devises, pp. 95, 96, ed. 1739.

(*c*) *Lugg v. Lugg*, Salk. 592; *Overbury v. Overbury*, 2 Show. 242.

(*d*) *Forse v. Hemblinge*, 4 Rep. 60 h.

(*e*) 1 P. Wms. 304; 1 Eq. Ca. Abr. 413.

(*f*) 2 Dickens, 445.

(*g*) In *Sprague v. Stone*, Ambl. 721; *Brady v. Cubitt*, Dougl. 31; *Doe v. Lancashire*, 5 T. R. 49; in *Kenebel v. Scrafton*, 2 East, 530; *Exp. E. Ilchester*, 7 Ves. 348; *Sheath v. York*, Ves. & Beav. 397.

(*h*) *Jackson v. Hurlock*, Ld. Northington, Ch. Ambl. 494; 2 Eden, 63; per Dr. Hay, in *Shepherd v. Shepherd*, Hil. 1770, in Prerog. Court.

(*i*) *Doe v. Barford*, 4 M. & S. 10. Marriage alone is now sufficient to revoke a will. See sect. 18 of Will Act, *infra*, p. 825.

made for the objects of these relations, is such a material change in the circumstances of the testator's family, as will work a revocation of the devise of land (*k*). In a subsequent case, the rule was thus laid down: that, in the case of a will of an unmarried man, having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation (*l*). And in a case where, after making his will, the testator married, and his wife became pregnant with his knowledge, the posthumous child was considered for this purpose in the same condition as a child born during the testator's lifetime (*m*). This rule of revocation, like the preceding, was formerly considered as grounded upon a presumed alteration of intention in the testator; but Lord *Kenyon*, C. J., thought it was founded "on a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family" (*n*). But this rule has been held to apply only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. Hence, where A. devised certain lands to B. in trust, and directed him to pay, out of the rents and profits, an annuity to M. S., with whom he cohabited, and in case he should leave any child or children by M. S., to raise a sum of money to be paid among his children, and then devised the remainder of his estate to several of his relatives; and afterwards A. married M. S., by whom he had several children: it was held (*o*), that the will was not revoked; either, 1st, on the ground of a tacit condition annexed to the will, *viz.* that it should be void in the event of a marriage and children, *without provision*; inasmuch as that condition, *viz.* of marriage, and of the birth of children *unprovided for*, had not taken effect; or, 2ndly, on the ground of an intention to revoke, to be presumed, in favour of a wife and children unprovided for, because, the fact upon which such presumption could be formed, did not exist in the present case. And it must further be remarked, that both the circumstances of a subsequent marriage and the having of child or children must concur to work an implied revocation: the birth of a posthumous child alone, although the testator die childless, is not sufficient (*p*). Parol evidence to show

(*k*) See *Exp. Earl of Ilchester*, 7 Ves. 242.

(*l*) By *Tindal*, C. J., delivering judgment in Exch. Chamb. in *Marston v. Roe* d. *Fox*, 8 A. & E. 60; 2 Nev. & P. 504.

(*m*) *Doe v. Lancashire*, 5 T. R. 49.

(*n*) *Ibid.*, recognized by *Tindal*, C. J., delivering judgment in *Marston v. Roe*

d. *Fox*, on error in Exch. Chamb., 8 A. & E. 57, 58; 2 Nev. & P. 504.

(*o*) *Kenebel v. Scrafton*, 2 East, 530, where *Ld. Ellenborough*, C. J., seems to have approved of *Ld. Kenyon's* opinion, cited above.

(*p*) *Doe d. White v. Barford*, 4 M. & S. 10.

that the testator meant his will to stand good notwithstanding his subsequent marriage and the birth of issue, is inadmissible (q).

Having endeavoured to illustrate the nature of implied revocations, strictly so called, it will be proper, in the next place, to take notice of those acts, by which a devise of land may more properly be said to be annulled than revoked; though the latter term is most frequently applied to this subject. The acts here alluded to are such, whereby a material alteration is made by the testator, in his seisin of the estate devised, after the execution of the will. The authorities on this subject are of very ancient date, beginning in the latter end of Queen Elizabeth's reign, and continued down in a regular series to the present time, with a few exceptions. The rule to be collected from these authorities appears to be this,—that *where a person seised of an estate, devises it, and afterwards conveys his whole interest, either by feoffment, lease and release (r), bargain and sale fine (s), or recovery (t), though but for an instant, and though he takes back the estate to the same use as before, or though the old use results to him again so as to descend in the same line as before, still the conveyance operates to annul his will.* This rule is founded on a technical principle of law, introduced, as it should seem, originally in favour of the heir; viz. that in order to render a devise valid and effectual, it is necessary that the seisin of the devisor should remain unaltered from the execution of the will until the death of the devisor. The foundation of the rule being wholly independent of the intention of the testator to revoke, the rule will operate where the provisions of the subsequent conveyance are consistent with the provisions of the will; and even where such conveyance is made for the express purpose of confirming the will. Hence, also, parol evidence to show that the testator did not intend, by the subsequent conveyance, to revoke his will, is inadmissible (u). In conformity with the preceding rule, it has been held, that where *the whole estate* is conveyed by lease and release to uses, although there be a resulting use in the ultimate reversion to the grantor by the same instrument, yet the conveyance will operate as a revocation of a prior will (x). It will be observed, that, in the preceding instances, the *whole* estate was conveyed; and therefore the party did not die seised of that estate which he had at the time of making his will; and consequently the devise, which will only operate upon that seisin, which the testator had at the time of making his will, was annulled or revoked; but where the devisor does not part with his whole estate, *e. g.* where he grants an estate for years only to the devisee, to commence in the life of the devisor, in such case, the conveyance will not operate

(q) *Marston v. Roe d. Fox*, 8 A. & E. 14.

(r) *Earl of Lincoln's case*, 2 Freem. 202; Show. P. C. 154.

(s) *Doe d. Dilnot v. Dilnot*, 2 N. R. 401; *Parker v. Biscoe*, 8 Taunt. 699;

3 Moore, 24.

(t) *Doe d. Lushington v. Bp. of Llandaff*, 2 N. R. 491.

(u) *Goodtitle v. Otway*, 2 H. Bl. 516.

(x) *Ibid.*, 1 B. & P. 576; 7 T. R. 399.

as a revocation of the fee (*y*). In like manner, if a man devises land in fee to A., and afterwards makes a mortgage thereof in fee, either to the devisee (*z*) or a stranger (*a*), this mortgage in fee, though a revocation of the will in law, will not operate as such in equity, and the right of redemption will pass by the will. And the same rule holds in equity with respect to a conveyance in fee for payment of debts (*b*).

Secondly. As to Wills made on and after 1st January, 1838.

An unattested codicil without a date, the will dated in 1830, and the deceased dying in January, 1839, was presumed to have been executed before January, 1838 (*c*).

The foregoing sections of the Statute of Frauds, and the construction thereof, are applicable to all wills made before the 1st of January, 1838, at which time the Act for the Amendment of the Laws with respect to Wills, 7 Will. IV. & 1 Vict. c. 26, came into operation. The particular provisions, the more important of which will be found in the ensuing pages, relate to the property which may be disposed of by will; the persons by whom wills may be made: the forms which are to be observed in making them; and the modes of revoking, altering, and reviving them; to which are added, other provisions for correcting certain rules of construction, by which the intentions of testators were often defeated. It would be beyond the scope of this work, however, to enter upon any discussion of the numerous decisions upon this statute, which are to be found in the reports.

The 1st section defines the meaning of the following words in the act: "Will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of stat. 12 Car. II. c. 24, or of stat. 14 & 15 Car. II. (I.) and to any other testamentary disposition; "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts,

(*y*) 2 Atk. 72; *Vawser v. Jeffery*, 3 B. & A. 462.

(*z*) *Baxter v. Dyer*, 5 Ves. jun. 656.

(*a*) Admitted to be a settled point in *York v. Stone*, Salk. 158. Adjudged by Sir John Churchill, M. R., and Lord

Jefferies, Ch., in *Hall v. Dench*, 1 Vern. 329, 342.

(*b*) Adm. in *Cave v. Holford*, 3 Ves. jun. 654.

(*c*) *Pechell v. Jenkinson*, 2 Curt. Ecc. Rep. 273.

choses in action, rights, credits, goods, and all other property; which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend to a female as well as a male.

By sect. 2, 32 Hen. VIII. c. 1; 34 & 35 Hen. VIII. c. 5; 10 Car. I. sess. 2, c. 2 (I.); sections 5, 6, 12, 19, 20, 21 and 22 of the Statute of Frauds, 29 Car. II. c. 3; 7 Will. III. c. 12 (I.); 4 & 5 Ann. c. 16, s. 14; 6 Ann. c. 10 (I.); sect. 9 of 14 Geo. II. c. 20; 25 Geo. II. c. 6 (except as to colonies); 25 Geo. II. c. 11 (I.); and 55 Geo. III. c. 192, are repealed, except so far as the same respectively relate to any wills or estates, *pur autre vie*, to which this act does not extend.

Formerly, such real estates only as a person was seised of at the time of making his will, would pass by the will; real estate purchased intermediately between the making the will and the death, would not so pass: but now, by sect. 3, every person may devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised would devolve upon the heir at law, or customary heir of him, or, if he become entitled by descent, of his ancestor, or upon his executor, or administrator (e); and the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will, or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or incorporeal hereditament: and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same

(e) This does not enable a testator to bequeath a promissory note, so as to pass

the right to sue upon it. *Bishop v. Curtis*, 18 Q. B. 878.

respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

The 4th section requires, where estates have not been surrendered to the use of the will, the payment of fees, fines, and stamp duties, by the devisees of customary freehold, copyhold and customary estates.

The 5th section enacts, that the wills or extracts of wills of customary freeholds, &c., shall be entered on the court rolls, and that the lord shall be entitled to the same fine, &c., when such estates could not have been disposed of by will if this act had not been made, as he would have been from the customary heir in case of descent.

Sect. 7 declares that no will made by any person under the age of twenty-one years shall be valid; and sect. 8 provides, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

Sect. 9 enacts that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe (*f*) the will in the presence of the testator, but no form of attestation shall be necessary.

Upon the construction of this section, there have been a very great variety of decisions in the ecclesiastical courts, which gave rise to so much doubt and caused such grievous hardship, as to have induced the legislature to pass the statute 15 Vict. c. 24. Section 1 of which statute provides, that where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for

(*f*) See *Roberts v. Phillips*, 4 E. & B. 450; *Payne v. Scriven*, 7 Notes of Ecc. C. 123.

him as aforesaid, be deemed to be valid within the said enactment; as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will, that the testator intended to give effect, by such his signature, to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow, or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will, whereon no clause, or paragraph, or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act, or this act, shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made. By sect. 2, the provisions of that act "shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will."

By sect. 10 of the Wills Act, no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner before required; and every will executed in manner before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

By sect. 11 wills of personal estate made by soldiers in actual service, or mariners or seamen at sea are excepted (*h*). By sect. 12 the provisions of 11 Geo. IV. & 1 Will. IV. c. 20, with respect to wills of petty officers and seamen and marines are left untouched.

By sect. 13, every will executed in manner before required shall be valid without any publication thereof; and by sect. 14, if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not, on that account, be invalid. By sect. 15, if any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, legacy, estate, gift, or appointment, of or affecting any real or personal estate, (except charges and directions for the payment of any debt,) shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under them, be utterly void: and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, &c. By sect. 16, in case by any will any real or personal estate shall be charged with any debt, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, &c.

By sect. 17, no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, &c.

By sect. 18, every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions). By sect. 19, no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

By sect. 20, no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner before required, or by some other writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the

(*h*) A full discussion of the question, what amounts to actual service, will be found in *Drummond v. Parish*, 3 Curt.

Ecc. Rep. 522; and *White v. Repton*, *Ibid.* 818.

testator, or by some person in his presence and by his direction, with the intention of revoking the same (*i*).

By sect. 21, no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will (*k*).

By sect. 22, no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

By sect. 23, no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

By sect. 24, every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*l*). By sect. 25, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised in any devise in such will contained, which shall fail or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

(*i*) See *Price v. Powell*, 3 H. & N. 341; *Hobbs v. Knight*, 1 Curt. Ecc. R. 768; *Stephens v. Taprell*, 2 Curt. Ecc. R. 458.

(*k*) See *Doc d. Shallcross v. Palmer*,

16 Q. B. 747; *Cooper v. Bockett*, 4 Moo. P. C. C. 419; *Cann v. Gregory*, 22 L. J., Chan. 1059.

(*l*) See *O'Toole v. Browne*, 3 E. & B. 572.

By sect. 26, a general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands (*m*). By sect. 27, a general devise shall include estates over which the testator has a general power of appointment. By sect. 28, where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. By sect. 29, the words "die without issue," or "die without leaving issue," shall be construed to mean, die without issue living at the death. By sect. 30, where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. By sect. 31, where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

By sect. 32, where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

By sect. 33, where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

By sect. 34, this act shall not extend to any will made before

(*m*) See *Wilson v. Eden*, 18 Q. B. 474 ; 5 Exch. 752.

the 1st of January, 1838; and every will re-executed or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived: and this act shall not extend to any estate *pur autre vie* of any person who shall die before the 1st of January, 1838. It has been held, by the Judicial Committee of the Privy Council, that the words which prevent the act from extending to any will made before January 1st, 1838, do not apply where a will so made is republished by a codicil after that date; the republication being a new making of the will (*n*): hence, a will of lands made before January 1st, 1838, and revoked, may, under the ninth and thirty-fourth sections of this act, be republished after that day by a codicil attested by two witnesses only (*o*).

By sect. 35, this act shall not extend to Scotland.

By the statute 20 & 21 Vict. c. 77, "to amend the law relating to Probates and Letters of Administration in England," it is provided that, where a will relating to realty is proved in solemn form, or the validity of such will is disputed in any contentious cause or matter, the heir or devisees and others interested in the realty are to be cited (*p*). But the probate, decree, or order of the court will not affect the heir or any other person in respect of his interest in realty unless cited or deriving title through a person cited (*q*). The 62nd section enacts, that "where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate, shall in all courts, and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration) be received as conclusive evidence of the validity and contents of such will in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this act, such decree or order shall enure for the benefit of the heir at law, or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such

(*n*) *Brooke v. Kent*, 3 Q. B. 178, n.; (*p*) Sects. 61 and 63.
3 E. F. Moore, 334. (*q*) Sect. 63.
(*o*) *Andrews v. Turner*, 3 Q. B. 177.

decrees or orders.” The 64th section is as follows:—“In any action at law or suit in equity, where according to the existing law it would be necessary to produce and prove an original will, in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding, to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form or have been otherwise declared valid in a contentious cause or matter as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.”

CHAPTER XXIII.

• GAME.

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I. *Of the Right of taking and destroying the Game at Common Law, and of the Stat. 1 & 2 Will. IV. c. 32.*

It has been asserted by Sir W. Blackstone, in his Commentaries, that, by the common law, the sole property or all the game in England is vested in the king alone, and that the sole right of taking and destroying the game belongs exclusively to the king; and consequently, that no person, of whatever estate or degree, has a right to kill game, even upon his own land, unless by licence or grant from the king. This position, however, has been questioned by Mr. Christian, in a note to his edition of the Commentaries, vol. 2, p. 419, n. 10. See, also, Mr. Justice Coleridge's note, vol. 2, p. 419.

It is frequently said in the authorities, that there is a qualified or specified right of property in game, that is in animals *feræ naturæ*, which are fit for the food of man, whilst they continue in their wild state: this means that there is an exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession (*a*).

If A. start a hare in the ground of B., and hunt and kill it there, the property continues all the while in B.; but if A. start a hare in the ground of B., and hunt it into the ground of C., and kill it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the ground, as well of B. as C. (*b*); but some doubt has been thrown upon this last proposition in the

(*a*) *Blades v. Higgs*, 11 H. L. Cas. 631, *per Westbury*, L. C.

(*b*) *Per Holt*, C. J., in *Sutton v. Moody*, 1 Ld. Raym. 251; 2 Salk. 556; 5 Mod.

375; *Deane v. Clayton*, 7 Taunt. 489, recognized in *Jordin v. Crump*, 8 M. & W. 782.

House of Lords (c). Trespass for a dead hare, the property of plaintiff.—The plaintiff, a farmer, being out hunting with hounds of which he had in part the management, and actually had such management at the time, though the hounds belonged to other persons, the hounds put up a hare in a third person's ground, and followed her into a field of the defendant, where, being quite spent, she ran between the legs of a labourer who was accidentally there, where one of the dogs caught her, and she was taken up alive by the labourer, from whom the defendant immediately afterwards took the hare and killed her. Shortly after the plaintiff came up, and claimed to have the hare as his own, but the defendant refused to give it up, and questioned the right of the plaintiff to be where he then was. The labourer took the hare from the dogs, not for his own use, but in aid of the hunters. Verdict for the plaintiff, 40s. damages. Rule for new trial, after argument, was discharged; Lord *Ellenborough*, C. J., observing, that the plaintiff, through the agency of his dogs, had reduced the hare into his possession. The labourer took it for the benefit of the hunters, which is the same as if it had been taken by one of the dogs. *Secus*, if the labourer had taken it up for the defendant, before it was caught by the dogs, or if he had taken it as an indifferent person in the nature of a stakeholder (d).

Title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Grouse were shot and taken away by a trespasser, upon and from the land of the plaintiff, who brought trover for the dead grouse, and it was clearly held by the judges of the Court of Exchequer, and afterwards by all the judges in the Court of Error, that the grouse, as they were killed, and fell upon the land of the plaintiff, became and were his absolute property, in respect of his ownership of the soil (e). So where conies were found killed and taken upon A.'s land, by a trespasser, who immediately carried them away, and sold them to a dealer in game; it was held, by the House of Lords, confirming the judgment of the courts below, that the servants of A. were justified in taking them away from the dealer, upon his refusal to give them up, because they were the property of their master (f).

An exception in a conveyance made in the year 1655, of the free liberty of hawking and hunting, does not include the liberty of shooting feathered game with a gun (g). Rooks are a species of birds *feræ naturæ*, destructive in their habits, not known as an

(c) *Per Lord Chelmsford, Blades v. Higgs*, 11 H. L. Cas. 639.

(d) *Churchward v. Studdy*, 14 East, 249.

(e) *The Earl of Lonsdale v. Rigg*, 1 H.

& N. 923.

(f) *Blades v. Higgs*, 11 H. L. Cas. 621.

(g) *Moore v. Lord Plymouth*, 7 Taunt. 614.

article of food, and not protected by any statute; hence a person cannot have any property in them, or show any right to have them resort to his trees (*h*).

The franchise of free warren is of great antiquity, and very singular in its nature. It gives a property in wild animals; and that property may be claimed in the land of another, to the exclusion of the owner of the land. Such a right ought not to be extended by argument and inference to any animals not clearly within it. There is not any book in the law which has mentioned grouse as a bird of warren. Manwood confines his description to two species, pheasants and partridges. Hence it has been held, that the owner of a free chase and free warren cannot maintain an action for killing and taking away grouse shot within the limits of the free warren (*i*).

In a case where it did not appear that, at the time of the grant, the locus in quo was applied to purposes of warren, or that any distinct right of free warren, independent of the general forest right, was then subsisting on it; and the grant did not contain any words showing an intention of the crown to create such right, and pass it de novo; it was held, that free warren would not pass by general words in a grant from the crown of lands within a forest of the crown (*k*). A grant, by the king, of free warren of land of which he is seised in fee, is a grant of free warren in gross (*l*).—James I. granted to R. T. and his heirs, the king's manor and town of Aulton, and the king's hundred of Aulton, with its rights, and all other things to the said manor and hundred belonging; and also, that they should have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and on all other lands and woods being in the same hundred, &c., although the same demesne and other lands were within the king's forest, &c.; it was held, that this grant did not confer a right of free warren over the king's lands within the hundred, but that the term "demesne" applied to lands held by R. T. as lord of the manor of Aulton, and that "other lands" applied to tenemental lands held by R. T. in fee of the king, or of any other lord within the limits of the grant. The term "demesne lands" properly signifies lands of a manor, which the lord either has, or potentially may have, in propriis manibus (*m*).

The right of taking and destroying the game can only be exercised on a person's own estate: and not even a lord of a manor, or his gamekeeper, can go into any part of the manor, which is not

(*h*) *Hannam v. Mockett*, 2 B. & C. 934.

(*i*) *Duke of Devonshire v. Lodge*, 7 B. & C. 36.

(*k*) *Smith v. Carr*, B. R. Trin. 53 Geo. III., shortly reported in a note to *Attorney-General v. Parsons*, 2 Tyrw. 243; 2 Cr. & Jer. 270; S. C. will be

found among the paper books of Dampier, J. D. P. B. No. 27, Dampier MSS. Lincoln's Inn Library.

(*l*) *Morris v. Dimes*, 1 A. & E. 654.

(*m*) *Attorney-General v. Parsons*, 2 Cr. & J. 279.

the lord's own estate or waste without being a trespasser, as any other person would be; unless a right of entry in pursuit of the game be specially reserved to him (*n*). A grant to a person, *his heirs and assigns*, of the liberty with servants or otherwise, to come upon certain land, and there to hawk, hunt, &c., at their will and pleasure, is a grant of a profit *à prendre*, and not a mere personal licence of pleasure: and therefore enables the grantee to hawk, hunt, &c., on the land, and carry away the game, or authorize his servants to do so in his absence (*o*). But a grant of full liberty to a person, his executors and administrators, and his and their friends, in his or their company, or with his or their permission, and to and for his or their gamekeeper, to hunt, course, shoot, and fish, over lands, is not such an interest as can pass under the execution of a power to lease lands or any part or parts thereof (*p*). "It is the land itself which gives the right of shooting, and the lessor has no power to separate the land from one of its incidents" (*q*).

A demise of the exclusive right of sporting over land does not give the lessee the right to turn out game not bred thereon in the ordinary way (*r*).

Hunting for pleasure over a man's land, without his leave, is an unjustifiable trespass (*s*).

A man enticing game away from his neighbour's land to his own is guilty of no unlawful act (*t*).

But an action lies for discharging guns near the decoy pond of another, with the intention of injuring the owner by frightening away the wild fowl, the owner being damnified, on the ground that it amounts to hindering another in his trade (*u*).

So it is no defence to an action for a nuisance, for fixing rockets, with intent to frighten away grouse from plaintiff's land, to plead that defendant did it to prevent plaintiff from killing grouse that he had enticed from the defendant's land (*x*).

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence enters plaintiff's land, and chases and destroys young pheasants (*y*).

For the qualifications of estate and degree, which were necessary under the old statutes, to entitle a person to keep and use guns, &c.,

(*n*) As to what amounts to a reservation of the right of shooting, see *Graham v. Ewart* (in error), 1 H. & N. 550; 26 L. J., Exch. 97, overruling *Greathead v. Morley*, 3 M. & Gr. 139.

(*o*) *Wickham v. Hawker*, 7 M. & W. 63.

(*p*) *Dayrell v. Hoare*, 12 A. & E. 356.

(*q*) *Per Patteson, J.*, *ibid.*

(*r*) *Birkbeck v. Paget*, 31 Beav. 408.

(*s*) *The Earl of Essex v. Capel*, Chitty's Game Laws, 32, n. *Baker v. Berkely*, 3 C. & P. 33.

(*t*) *Ibbotson v. Peat*, 34 L. J., Ex. 118.

(*u*) *Keeble v. Hickeringill*, 11 East, 571.

(*x*) *Ibbotson v. Peat*, 34 L. J. Ex. 118.

(*y*) *Read v. Edwards*, 17 C. B. (N. S.) 245.

for the destruction of the game, and the construction thereof, the reader is referred to the eighth and former editions of this work. These qualifications, and numerous statutes relating to game, were repealed by stat. 1 & 2 Will. IV. c. 32; the 6th section of which enacts, that every person, who shall have obtained an annual game certificate (*z*), shall be authorized to kill and take game subject to an action or such other proceedings as are mentioned in the statute.

Sect. 2 enacts that the word game shall, for all the purposes of this act, be deemed to include hares (*a*), pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Sect. 7.—“In all cases, where any person shall occupy any land under any lease or agreement made previously to the passing of this act, excepting in the cases hereinafter next excepted, the lessor or landlord shall have the right of entering upon such land or of authorizing any other person who shall have obtained any annual game certificate to enter upon such land, for the purpose of killing or taking the game thereon; and no person occupying any land under any lease or agreement, either for life or for years, made previously to the passing of this act, shall have the right to kill or take the game on such land, except where the right of killing the game upon such land has been expressly granted or allowed to such person by such lease or agreement, or except where, upon the original granting or renewal of such lease or agreement, a fine or fines shall have been taken, or except where, in the case of a term for years, such lease or agreement shall have been made for a term exceeding twenty-one years.”

Sect. 8.—“Nothing in this act contained shall authorize any person seised or possessed of, or holding, any land, to kill or take the game, or permit any other person to kill or take the game, upon such land, in any case where, by any act, deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person; nor shall anything in this act contained, defeat or diminish any reservation, exception, covenant, or agreement already contained in any private act of parliament, deed, or other writing relating to the game upon any land, nor in any manner prejudice the rights of any lord or owner of any forest, chase, or warren, or of any lord of any manor, lordship, or royalty, or reputed manor, &c., or of any steward of the crown of any manor, &c. appertaining to his Majesty.”

By sect. 9, this act is not to affect any of his Majesty's forest

(*z*) Now by 11 & 12 Vict. c. 29, persons in the occupation of enclosed ground, where there is not an agreement to the contrary, and, in certain cases, owners may kill hares without a certificate, and

may grant authority to kill hares to *one* person at the same time in any one parish. See *post*, p. 845.

(*a*) *Ibid*.

rights, &c. ; nor by sect. 10, any cattle-gates or rights of common ; and lords of manors are to have the game on their wastes.

By sect. 11, "Where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person who shall have obtained an annual game certificate, to enter upon such land for the purpose of pursuing and killing game thereon."

By sect. 12,—Where the right of killing the game upon any land is by this act given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to the lessor, landlord, or any person other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game, upon such land, or shall give permission to any person so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two J. P., pay a sum not exceeding two pounds, and for every head of game so killed or taken, a sum not exceeding one pound, with costs.

By sect. 23,—Persons killing or taking any game, or using any dog, net, gun, or other engine or instrument for the purpose of searching for or killing or taking game, not being authorized so to do for want of a game certificate, shall, on conviction before two J. P., forfeit for every such offence a sum not exceeding five pounds, with costs : provided, that no person so convicted shall, by reason thereof, be exempted from any penalty or liability under any statute relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty.

By sect. 30, reciting, that after the commencement of this act,—Game will become an article, which may be legally bought and sold, and it is therefore just to provide some more summary means than now by law exist for protecting the same from trespassers : it is enacted, that if any person shall commit any trespass, by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a J. P., forfeit a sum not exceeding two pounds, with costs : and if any persons to the number of five or more together shall commit any trespass, by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, each of such persons shall, on conviction thereof before a J. P., forfeit a sum not exceeding five pounds, with costs : provided, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass ; save and except that the leave and license of the occupier of the land so trespassed upon shall not be a suffi-

cient defence in any case, where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as before mentioned: but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license; and that the lord or steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall be deemed to be the legal occupier of the land of the wastes or commons within such manor, &c., or reputed manor, &c.

Upon an information under this section, the jurisdiction of the justices is not ousted by a *bond fide* claim of a prescriptive right in gross to kill game on the land, there being no colour for such claim. The claim of title, also, must be a claim of title in the party charged, and not in a third person (b).

Where a man being upon land upon which he was privileged shot a pheasant in the adjoining land, and went and picked it up without leave, it was held a trespass in pursuit of game within this section (c). But where a pheasant rose in A.'s land and flew over B.'s close, and A. shot it whilst it was over such close, and then entered and picked it up, it was held that the justices were justified in finding that this was not within the section, as "in search or pursuit of game" means of "living game," and it was consistent with this case that the only trespass committed was the trespass of entering B.'s land to pick up the dead bird (d).

By sect. 31, "Where any person shall be found on any land, or upon his Majesty's forests, parks, chases, or warrens, in the day-time, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, the person having the right of killing the game upon such land, by virtue of any reservation or otherwise, as before mentioned, or the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise), or the game-keeper or servant of either of them, or any person authorized by either of them, or the warden, ranger, verderer, forester, master-keeper, underkeeper, or other officers of such forest, &c., may require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name, or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning

(b) *Cornwell* app. v. *Saunders* resp., 3 B. & S. 206; 32 L. J., Q. B. 16; *Leatt* v. *Vine*, 8 L. T. (N. S.) 581.

(c) *Osborn* app. v. *Meadows* resp., 12

C. B. (N. S.) 10; *Mayhew* v. *Wardley*, 14 C. B. (N. S.) 550.

(d) *Kenyon* v. *Hart*, 6 B. & S. 249.

upon the land, the party so requiring as aforesaid, and any person acting by his order and in his aid, may apprehend such offender, and convey him as soon as conveniently may be before a J. P. ; and such offender (whether so apprehended or not), upon being convicted of any such offence before a J. P., shall forfeit a sum not exceeding five pounds, with costs : provided that no person so apprehended shall, on any pretence, be detained for a longer period than twelve hours from the time of his apprehension until he shall be brought before some J. P., and that if he cannot, on account of the absence or distance of the residence of any such J. P., or owing to any other reasonable cause, be brought before a J. P. within such twelve hours, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions hereafter mentioned, as if no such apprehension had taken place."

By sect. 34, "For the purposes of this act, the *day-time* shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset."

By sect. 35, "The aforesaid provisions against trespassers and persons found on any land, shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox, already started upon any other land, nor to any person *bonâ fide* claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren, or free chase, nor to any lord or any steward of the crown of any manor, lordship, or royalty, or reputed manor, &c., nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, &c., or reputed manor," &c.

By sect. 36, "When any person shall be found by day or night upon any land or in any of his Majesty's forests, parks, chases, or warrens, in search or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of killing the game upon such land by virtue of any reservation or otherwise, as before mentioned, or for the occupier of such land, (whether there shall or shall not be any such right, reservation, or otherwise,) or for any gamekeeper or servant of either of them, or for any officer as aforesaid of such forest, &c., or for any person acting by the order and in aid of any of the said several persons, to demand from the person so found such game in his possession, and in case such person shall not immediately deliver up such game, to seize and take the same from him, for the use of the person entitled to the game upon such land, forest, park, chase, or warren." For the best manner of pleading a justification for

an act done under the authority of this section, see *Wisdom v. Hodson*, 3 Tyrw. 811.

By sect. 46, "Nothing in this act shall prevent any person from proceeding, by way of civil action, to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this act, against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall, in such case, be a bar to any such action, and may be given in evidence, under the general issue."

By sect. 47, "For the protection of persons acting in the execution of this act, it is enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and the defendant may plead the general issue, and give this act and the special matter in evidence; and no plaintiff shall recover in such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant."

A person acting as a gamekeeper by virtue of a deputation, granted under stat. 48 Geo. III. c. 93, is not entitled (*e*) to a month's notice of action under this section, for no one is a gamekeeper under this act, unless he be registered with the clerk of the peace under it; such a person is excluded, therefore, from the privileges conferred by the act, by the express language of sect. (16) (*f*), the deputation being not only given, but registered, under the old law.

The foregoing act does not extend to Scotland or Ireland. As to Scotland, see 2 & 3 Will. IV. c. 68. As to Ireland, see 13 Rich. II. c. 13; 10 Will. III. c. 8; 27 Geo. III. c. 35; 27 & 28 Vict. c. 67. For offences relating to the game, which are the subject of indictment, or other penal enactments, see stat. 9 Geo. IV. c. 69 (extended by stat. 7 & 8 Vict. c. 29), for the more effectual prevention of persons going armed by night for the destruction of game. See, also, 24 & 25 Vict. c. 96, s. 11, 17, the Consolidated

^r (*e*) *Per Tindal*, C. J., in *Bush v. Green*, 4 B. N. C. 41; 5 Scott, 289; recognized in *Linster v. Borrow*, 9 A. & E. 654.

(*f*) See p. 842, where this section is set out.

Larceny Act; 25 & 26 Vict. c. 114, an act for the prevention of poaching, and which gives power to constables to search suspected poachers in certain cases.

II. *Of the Appointment and Authority of Gamekeepers under the statute 1 & 2 Will. IV. c. 32.*

By sect. 13 of 1 & 2 Will. IV. c. 32, it is enacted that: "It shall be lawful for any lord of a manor, lordship, or royalty, or reputed manor, &c., or any steward of the crown of any manor, lordship, or royalty, appertaining to his Majesty, by writing under hand and seal, or in case of a body corporate, then under the seal of such body corporate, to appoint one or more persons as gamekeepers, to preserve or kill the game within the limits of such manor, &c., or reputed manor, &c., for the use of such lord or steward thereof, and may authorize such gamekeeper, within the same limits, to seize and take for the use of such lord or steward, all such dogs, nets and other engines and instruments for the killing or taking of game as shall be used within the said limits by any person not authorized to kill game for want of a game certificate." By sect. 14, any lord of a manor, &c., or reputed manor, &c., or any steward of the crown of any manor, &c., appertaining to his Majesty, may appoint and depute any person, whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male servant of any other person or not, to be a gamekeeper for any such manor, &c., or reputed manor, &c., or for such district of such manor, &c., as such lord or steward of the crown shall think fit, and may authorize such person, as gamekeeper, to kill game within the same for his own use, or for the use of any other person who may be specified in such deputation, and also may give to such person all such power and authorities as may, by virtue of this act, be given to any gamekeeper of a manor; and no person so appointed gamekeeper, and empowered to kill game for his own use, or for the use of any other person so specified as aforesaid, and not killing any game for the use of the lord or steward of the crown of the manor, &c., or reputed manor, &c., for which such deputation shall be given, shall be deemed to be or shall be entered or paid for as the gamekeeper or male servant of the lord or steward making such deputation. By sect. 6, it is provided, that no game certificate, on which a less duty than 3*l.* 13*s.* 6*d.* (g) is chargeable, under the act relating to game certificates, shall authorize any gamekeeper to kill or take any game, or to use any dog, gun, net, or

(g) "Game certificate" is to be read "licence to kill game," and "3*l.* 13*s.* 6*d.*" is to be read "3*l.*" by 23 & 24 Vict. c. 90, s. 6.

other engine or instrument for the purpose of killing or taking game, except within the limits included in his appointment as gamekeeper (*h*).

Sect. 15 contains regulations as to the appointment of gamekeepers by landowners of a certain value in Wales.

By sect. 16, no appointment or deputation of any person as a gamekeeper by virtue of this act shall be valid, unless, and until, it shall be registered with the clerk of the peace for the county, riding, division, liberty, franchise, city, or town, wherein the manor, lordship, or royalty, or reputed manor, &c., or the lands, shall be situate, for or in respect of which such person shall have been appointed gamekeeper; and in case the appointment of any person as gamekeeper shall expire or be revoked, by dismissal or otherwise, all powers and authorities given to him by virtue of this act shall immediately cease.

Sect. 17 authorises persons who have obtained an annual game certificate, to sell game to any person licensed to deal in game. Provided, that no game certificate on which a less duty than 3*l*. 13*s*. 6*d*. is chargeable under the acts relating to game certificates shall authorise any gamekeeper to sell any game, except on the account and with the written authority of the master, whose gamekeeper he is; but that any such gamekeeper selling any game not on the account and with the written authority of such master, may be proceeded against under this act, in the same manner as if he had no game certificate.

III. *Of the Destruction of the Game at improper Seasons of the Year.*

By stat. 1 & 2 Will. IV. c. 32, s. 3, persons killing or taking any game, or using any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game, on a Sunday or Christmas-day, on conviction before two J. P. shall forfeit a sum not exceeding 5*l*. with costs; and persons killing or taking any partidge between the 1st of Feb. and the 1st of Sept., or any pheasant between the 1st of Feb. and the 1st of Oct., or any black game, (except in the county of Somerset or Devon, or in the New Forest,) between the 10th of Dec. and the 20th of Aug. in the succeeding year, or in the county of Somerset or Devon, or in the New Forest, between the 10th of Dec. and the 1st of Sept.; or any grouse, commonly called red game, between the 10th of Dec. and the 12th of Aug., or any bustard, between the 1st of March and the 1st of

(*h*) As to authority to kill hares, see 11 & 12 Vict. c. 29, *post*, p. 845.

Sept., shall, on conviction before two J. P., forfeit for every head of game so killed or taken, a sum not exceeding 1*l*. with costs ; and persons, with intent to destroy or injure any game, putting poison or poisonous ingredients on the ground, whether opened or enclosed, where game usually resort, or in any highway, shall, on conviction before two J. P., forfeit a sum not exceeding 10*l*. with costs. By sect. 4, the possession of birds of game is made illegal, after ten days, in licensed dealers, and forty days in other persons, from the expiration of the season limited by the foregoing section.

IV. *Of the Duties made Payable in respect of Game Certificates.*

By the Game Act, 1 & 2 Will. IV. c. 32, s. 5, the existing laws respecting game certificates are to remain unaltered.

The stat. 23 & 24 Vict. c. 90, entitled "An Act to repeal the Duties on Game Certificates, and Certificates to deal in Game, and to impose in lieu thereof Duties on Excise Licences and Certificates for the like purposes," contains the following provisions:—the duties in respect of certificates to kill and deal in game, and the provisions for charging and collecting the same as contained in 52 Geo. III. c. 39 ; 56 Geo. III. c. 56 ; and 1 & 2 Will. IV. c. 32, are repealed (*i*), and in lieu of the duties repealed the following duties are to be levied:—"For a licence in Great Britain, or a certificate in Ireland, to be taken out by every person who shall use any dog, gun, net, or other engine, for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or lardrail, or any conies, or any deer, or shall take or kill by any means whatever, or shall assist in any manner in the taking or killing" of the same : if such licence shall be taken out after the 5th day of April, and before the 1st day of November,—

To expire on the 5th day of April in the following year	£3 0 0
To expire on the 31st day of October in the same year	2 0 0
If taken out on or after the 1st day of November, to expire on the 5th day of April following	2 0 0

Provided always, that any person having the right to kill game on any lands in England or Scotland, shall be entitled to take out a licence to authorize any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper, to kill game upon the same lands, upon payment of the duty of 2*l*.

And for every licence to deal in game in England, Scotland, or Ireland, to be granted under this act (*k*), 2*l*.

The duties granted are to be excise duties (*l*). The penalty for neglecting to take out a licence in Great Britain is 20*l*. (*m*). There are the following exceptions from the duties of the act:—1. The taking of woodcocks and snipes with nets or springes in Great Britain. 2. The taking or destroying of conies in Great Britain, by the proprietor of any warren, or by his direction or permission. 3. The pursuing and killing of hares, respectively, by coursing with greyhounds, or by hunting with beagles or other hounds. 4. The pursuing and killing of deer, by hunting with hounds. 5. The taking and killing of deer in any enclosed land, by the owner or occupier of such land, or by his direction or permission. Amongst the exceptions are: any person assisting a person licensed to kill game, who is not a keeper; as regards the killing of hares only, all persons who, under the provisions of the two several acts, 11 & 12 Vict. cc. 29, 30, respectively, are authorized to kill hares in England and Scotland respectively, without a certificate (*n*). Nothing in the act is to alter 11 & 12 Vict. cc. 29, 30, except that "game certificate" in those acts, or 1 & 2 Will. IV. c. 32, shall be read as "licence to kill game" (*o*). Gamekeepers' licences are not to be available out of the limits of the manor or the lands for which the keepers are appointed (*p*). Persons doing anything requiring a licence, if discovered by any officer of inland revenue, or by any lord or gamekeeper of the manor, or lands "wherein such person shall then be," or by any person having taken out a certificate, or by the owner, landlord, lessee, or occupier of the same, are to produce their licence on demand, or to give their names and addresses, and upon refusing they are liable to a penalty of 20*l*. (*q*). The licence is to be void if the party is convicted of any offence under 1 & 2 Will. IV. c. 32, or 2 & 3 Will. IV. c. 68 (*r*).

It is not necessary that the demand of the certificate should be made on the land (*s*) on which the party was sporting: but if not, the demand must be made immediately, and so as in some degree to form a part of the same transaction. Nor is it necessary that the party making the demand should produce any certificate; and if the other party refuse to produce (*t*) his certificate, he does so at the risk of whether the party demanding it is a gamekeeper, or other person having a right to demand it.

Licences and certificates respectively are to be available throughout the United Kingdom (*u*).

(*k*) S. 2.

(*l*) S. 3.

(*m*) S. 4.

(*n*) S. 5.

(*o*) S. 6.

(*p*) S. 9.

(*q*) S. 10.

(*r*) S. 11.

(*s*) *Scarth v. Gardener*, 5 C. & P. 40,
Tenterden, C. J.

(*t*) *Ibid.*

(*u*) S. 18.

By stat. 2 & 3 Vict. c. 35, sect. 4, justices of the peace are authorized to hold special sessions, for the purpose of granting licences to deal in game, at any time after July in every year, as well as in July, as enacted by stat. 1 & 2 Vict. c. 32, s. 18, and under similar regulations as to notice, &c., and the licences are to continue till the 1st July next following (*x*).

These provisions, as well as the provisions of 1 & 2 Will. IV. c. 32, are, as far as they are consistent with this act, to be in force throughout the United Kingdom; and a further provision is made that no person shall be authorized to sell game to a dealer unless he shall have taken out a 3*l*. licence (*y*). Persons licensed by the justices are required to take out licences under this act, and which licences can only be granted to persons who have obtained a justices' licence (*z*). The excise licences are to expire on the day mentioned in them (*a*). Persons dealing in game without an excise licence are liable to a penalty, although they may have a magistrates' licence (*b*).

The statute 11 & 12 Vict. c. 29, recited in the above act, is entitled, "An Act to enable Persons having a right to kill Hares in England and Wales, to do so by themselves, or Persons authorized by them, without being required to take out a Game Certificate." By it it is enacted, that it shall be lawful for any person in the actual occupation of any enclosed lands, or for any owner who has the right of killing game thereon, by himself or by any person authorized by him in writing, according to the form in the schedule to the act, or a form to the like effect, to kill any hare being upon such enclosed land without a certificate (*c*).

The authority to kill hares is to be limited to one person at one and the same time, in any one parish, and the authority or a copy is to be sent to the clerk of the petty sessions, who is to register it (*d*). Any person may course or hunt without a certificate (*e*). Nothing in the act is to be taken as making it lawful for a tenant to kill any hares when he has entered into an agreement with his landlord not to kill game (*f*).

The duties payable for gamekeepers are regulated by 16 & 17 Vict. c. 90, Sched. (C).

(*x*) See notes to 23 & 24 Vict. c. 90, s. 2, in Locke's Game Laws, by G. Evans. The recovery of penalties under the Excise Acts is regulated by 7 & 8 Geo. IV. c. 53; 4 & 5 Will. IV. c. 51; 4 & 5 Vict. c. 20; 11 & 12 Vict. cc. 118, 121; 15 & 16 Vict. c. 61; 23 & 24 Vict. c. 113, s. 39; and 24 & 25 Vict. c. 91, s. 46.

(*y*) S. 13.

(*z*) S. 14.

(*a*) S. 16.

(*b*) 24 & 25 Vict. c. 91, s. 17.

(*c*) 11 & 12 Vict. c. 29, s. 1.

(*d*) S. 2.

(*e*) S. 4.

(*f*) S. 6.

CHAPTER XXIV.

IMPRISONMENT.

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I. *Of the Nature of the Action for False Imprisonment, and in what Cases it may be maintained.*

FALSE imprisonment is a restraint on the liberty of the person without lawful cause; either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets, against his will (*a*). For this injury an action of trespass lies, usually termed an action for false imprisonment. An unlawful detention is a new caption, and may be declared on as such (*b*). An arrest on mesne process, which was not returned, was wrongful, and false imprisonment lay against the sheriff (*c*). So if an officer of an inferior court did not return the process directed to him, he was a trespasser *ab initio*, and false imprisonment lay against him; for he was considered as sheriff within the jurisdiction (*d*).

The sheriff must, at his peril, execute the writ upon the person really named therein (*e*); and if he mistakes the person, he is liable to an action for false imprisonment. A. B. brought false imprisonment against C., who justified that he had a warrant to arrest J. S., and having asked A. B., the plaintiff, what his name was, he answered J. S., whereupon C. arrested him. Plaintiff demurred, and judgment for plaintiff, because C., the defendant, ought, at his peril, to have taken notice of the person named in the writ (*f*). A commission of rebellion issued against T. G. appeared before the commissioners, and affirmed himself to be the person; whereupon they apprehended him by virtue of their com-

(*a*) *Per Thorpe*, C. J., 22 Ass. fo. 104, pl. 85.

(*b*) *Withers v. Henley*, Cro. Jac. 379.

(*c*) 2 Roll. Abr. 563, pl. 9. Arrest on mesne process is abolished by 1 & 2 Vict. c. 110, except where the plaintiff has a

cause of action of 20l. at least, and the defendant is about to quit the country.

(*d*) 2 Roll. Abr. 563, pl. 18.

(*e*) *Per Hankford*, J., 11 Hen. IV. c. 91.

(*f*) *Moore*, 457.

mission. *Per Hale, C. B.*,—"If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment, as has been held upon the execution of a *capias*" (*g*).

A sheriff's officer having received a warrant to arrest A., whose person he had never seen, went to her house, where he found her and the plaintiff together. Addressing himself to the plaintiff, he said, "I have a writ against you;" upon which A. desired the plaintiff to go with the officer. The officer immediately took plaintiff to a sponging-house, where he kept her all night; but the next morning, having discovered his mistake, he released her. *Kenyon, C. J.*, admitted the law to be as stated in the preceding case; but, considering this as a trick on the officer, directed the jury to give the plaintiff nominal damages only, which they did accordingly (*h*). But if a person, whose real name is W., is asked *before* process issues against him, whether his name is not J., and he says it is, he cannot maintain trespass for imprisonment under process against him by the wrong name (*i*). And so where he has allowed himself to be sued by a wrong name (*k*); or is known by the one name as well as the other (*l*). In all other cases a mistake in naming a person to be arrested, whether in a *capias* or a criminal warrant, is fatal, and renders all those concerned in the arrest liable in trespass (*m*). Although a person may be estopped by his conduct from denying that he was properly arrested, still the sheriff is not justified in *detaining* a person after he has had notice that such person is not the person mentioned in the writ (*n*). A writ of summons, in an action against A., was served on B., who told the person so serving him that his name was B., not A., and that he was not the person against whom the writ was issued. B., having taken no notice of the service, judgment was signed, and a writ of *ca. sa.* issued, under which he was taken in execution. Thereupon B. brought an action of trespass against the sheriff, who, justified under a writ of *ca. sa.*, directed to him against B. in the name of A. Held (in the Exchequer Chamber) that these facts did not prove the plea, and that the sheriff was liable (*o*).

If a magistrate's warrant is shown by the constable who has the execution of it, to the person charged with an offence, and he thereupon, *voluntarily, and without any, even the slightest com-*

(*g*) *Thurbane and another*, Hardr. 323. But see *Dunston v. Paterson*, 2 C. B. (N. S.) 495; *Pickard v. Sear*, 6 Ad. & E. 469; *Freeman v. Cooke*, 2 Ex. 654.

(*h*) *Oakley v. Flower*, Br. Middx. Sitings, Dec. 4, 1800, MS.

(*i*) *Price v. Harwood*, 3 Campb. 108.

(*k*) *Fisher v. Magnay*, 5 M. & G. 778.

(*l*) *Per Lord Kenyon, C. J.*, *Cole v.*

Hindson, 6 T. R. 235.

(*m*) *Shadgett v. Clipson*, 8 East, 328; *Hoye v. Bush*, 1 M. & G. 775; and see *Finch v. Cocken*, 2 C. M. & R. 196.

(*n*) *Dunston v. Paterson*, 2 C. B., N. S. 495.

(*o*) *Kelly v. Lawrence*, 2 H. & C. 1, in error.

pulsion, attends the constable to the magistrate, who after examination dismisses him, it seems that this will not constitute an arrest, so as to enable the party to maintain trespass for an assault and false imprisonment (*p*); for words merely will not make an arrest (*q*). So where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A., and asked him to fix a time to call and give bail; and A. accordingly fixed a time, attended, and gave bail; it was held, that this was not either an actual or constructive arrest. The sheriff's officer did not take a warrant with him, nor did he tell A. that he came to arrest him, but merely gave notice of the writ, and asked him to fix a time for giving bail (*r*). But where a bailiff who has process against one (*s*), says to him when he is on horseback or in a coach, "You are my prisoner, &c.," upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process (*t*).

Where after the suing out of a writ of *ca. sa.* upon a judgment in an action of debt, the plaintiff in the action gave a release to the defendant, and told the sheriff, "I have given a release; you must not go on to execute the writ;" and the sheriff afterwards executed the writ, it was held, that he was liable in an action of trespass (*u*).

An action for false imprisonment was brought by a native and inhabitant of Minorca, (then part of the dominions of the crown of Great Britain,) against the governor of the island, for imprisoning the plaintiff at Minorca, and causing him to be carried thence to Carthage, in Spain. The plaintiff laid the venue in London, stating the injury to have been committed at Minorca. The defendant justified, on the ground that the plaintiff had endeavoured to create a mutiny among the inhabitants of Minorca, whereupon the defendant, as governor, was obliged to seize the plaintiff, and imprison him, &c. The plaintiff replied *de injuriâ*. After verdict for the plaintiff, a bill of exceptions was tendered; and it was contended, among other things: 1st. That the plaintiff being a Minorquin, was incapacitated from bringing an action in the King's courts in England; but it was held, that a subject born in Minorca was as much entitled to appeal to the King's courts as a subject born in Great Britain; and that the objection of its not being stated on the record, that the plaintiff was born since the treaty of Utrecht, did not make any difference. 2ndly. That the injury having been done out of the realm, could not be tried in the King's courts in England; but it was held, that an action for false im-

(*p*) *Arrowsmith v. Le Mesurier*, 2 N. R. 211.

(*q*) *Genner v. Sparks*, Salk. 79; *Bieten v. Burridge*, 3 Campb. 139.

(*r*) *Berry v. Adamson*, 6 B. & C. 528; *Robinson v. Powell*, 5 M. & W. 479, *acc.*

(*s*) A pretence of process is sufficient. *Wood v. Lane*, 6 C. & P. 774.

(*t*) *Homer v. Battyn*, Bull. N. P. 62; *Peters v. Stanway*, 6 C. & P. 737, *acc.*

(*u*) *Barker v. St. Quintin*, 12 M. & W. 441.

prisonment being transitory, it was competent to the plaintiff to lay it in any county of England, although the matter arose beyond the seas (x).

An action will not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship *as prize*, although the ship has been acquitted (y); unless (*semble*) personal ill-treatment, not the necessary result of the capture, be used, *S. C.* (see *post*, 852). Nor will it lie for acts done by officers of the army or navy by order of ministers of state, or subsequently ratified by them, for in these cases the crown is alone responsible (z). Trespass for false imprisonment will lie against overseers of the poor for imprisoning a man under a justice's warrant, until he should pay a sum of money for the maintenance of a child, which should be born of a woman then pregnant by the plaintiff, but who had not as yet been delivered (a).

Trespass will lie against an attorney and client for suing out an illegal *ca. sa.* and causing a party to be arrested (b). A. employed B., an attorney, to enforce payment of a debt; B. directed his agent to sue out a justices in the County Court. Before the return of the justices the debtor paid the debt and costs to B. B.'s agent, not knowing of such payment, afterwards entered up judgment in the County Court, although the defendant had not appeared, and sued out execution: it was held, that A. and B. were liable as trespassers; for A. was answerable for the act of B., his attorney, and B. and his agent were to be considered as one person (c). And where an arrest is made under process which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass, as well as the plaintiff (d). But where the attorney procured a commissioner of bankrupts to issue a warrant for the attendance of a party to be examined, which warrant proved invalid, it was held, that the attorney was not liable in trespass, the granting of the warrant being the judicial act of the commissioner (e).

If a prisoner *in execution* escape by the voluntary permission of the gaoler, and the gaoler retake him, he is liable to an action for false imprisonment. But where an officer, before the abolition of arrest on *mesne process*, arrested a prisoner on such *process*, and voluntarily permitted him to escape, it was held that he might retake him *before* the return of the writ, without being liable to such

(x) *Mostyn v. Fabrigas*, Cowp. 161; Hargr. State Trials, xi. 162.

(y) *Le Cauz v. Eden*, 2 Doug. 594.

(z) *Buron v. Denman*, 2 Exch. 167. See *Duke of Brunswick v. King of Hanover*, 6 Beav. 1.

(a) *Wenman v. Fisher*, M. 2 Geo. II., B. R. MS., cited in *R. v. Banghurst*, H. 5 Geo. II. B. R., Sess. Ca. vol. 1, p.

149.

(b) *Barker v. Braham*, 3 Wils. 368; *Collett v. Foster*, 2 H. & N. 356, *acc.*; or against the attorney alone, *per Bramwell, B.*, *ibid.*

(c) *Bates v. Pilling*, 6 B. & C. 38.

(d) *Codrington v. Lloyd*, 8 A. & E. 449.

(e) *Cooper v. Harding*, 7 Q. B. 928.

action (*f*). Trespass for false imprisonment will lie for a detention under a lawful process, if it be executed at an unlawful time, as on a Sunday (*g*); for by 29 Car. II. c. 7, s. 6, it is provided,—That no person upon the Lord's Day shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace); but that the service of every such writ, &c., shall be void, and the person so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, &c. It appeared that the defendants, as constables, had arrested the plaintiff upon a Sunday, by virtue of a warrant from a justice of the peace, for getting a bastard child. An action for false imprisonment having been brought, *Adams, B.*, held, that plaintiff was entitled to recover (*h*). This statute forbids serving *original* process only on a Sunday. Where, therefore, there has been an escape against the will of a bailiff, he may retake on a Sunday. *Secus*, if voluntary. 2 Gun-der, 14, MS. So a detainer of a person already in custody may be lodged on a Sunday (*i*). Trespass for false imprisonment may be maintained against the sheriff for an arrest made by his bailiff after the return-day of the writ (*k*).

When a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, an action does not lie against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but when the court has not jurisdiction of the cause, the whole proceeding being *coram non iudice*, at common law an action lay against them, without any regard to the precept or process (*l*). Hence, where one of the bail had been arrested by process out of the Marshalsea, for the purpose of satisfying a judgment obtained against the principal in a cause, of which the Marshalsea Court (*m*) had no jurisdiction; it was held, that an action for false imprisonment would lie against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same (*n*). There are cases which have expressly decided that the officer is liable for executing the warrant, where the magistrate granting it had no jurisdiction (*o*). Formerly in the case of a warrant, illegal *on the face of it* for an excess of jurisdiction in the magistrate, trespass was maintainable against the committing magistrate, although the conviction had not been

(*f*) *Atkinson v. Matteson*, 2 T. R. 172.

(*g*) *Wilson v. Tucker*, Salk. 78.

(*h*) *Taylor v. Freeman and another*, Glouc. Lent. Ass. 1757, MS.

(*i*) *Samuel v. Buller*, 1 Exch. 439.

(*k*) *Parrott v. Mumford*, 2 Esp. 585.

(*l*) *Marshalsea case*, 10 Rep. 76, a. This principle has been frequently recognized. See *Nichols v. Walker*, Cro.

Car. 395; *Hill v. Bateman*, 2 Str. 711; *Perkin v. Proctor*, 2 Wils. 384; *Brown v. Compton*, 8 T. R. 424; *Exp. Story*, 8 Exch. 201.

(*m*) Abolished by 12 & 13 Vict. c. 101, s. 14.

(*n*) *Marshalsea case*, 10 Rep. 68, b.

(*o*) *Per Tindal, C. J., Morrell v. Martin*, 3 M. & G. 595.

quashed (*p*); although where the justice had competent jurisdiction, his judgment was conclusive, until reversed or quashed, and the conviction could not be controverted in evidence (*q*). But now in neither case can an action be maintained until the conviction has been quashed (*r*). If the conviction be subsequently quashed for want of jurisdiction, trespass is the proper remedy (*s*); if on other grounds, but the magistrate had jurisdiction, case (*t*). A conviction stated that the plaintiff had been brought before a magistrate on an information charging him with having unlawfully returned without a certificate to a parish from whence he had been removed, and that upon that occasion he confessed himself guilty; it was held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to show in his defence, that he did not return in a state of pauperism (*u*). A magistrate had committed the plaintiff for re-examination for a period of fourteen days. The jury found that the commitment was *bonâ fide*, and without any improper motive, but that the time for which the commitment was made was unreasonable. In such case trespass is the proper remedy, and not case; for the better opinion is, that such commitment is wholly void (*x*). A magistrate, who commits a party in a case where he has no jurisdiction, is liable to an action of trespass; but if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish them (*y*). "The question of jurisdiction does not depend on the truth or falsehood of the charge but upon its *nature*, it is determinable on the commencement not at the conclusion of the inquiry" (*z*). "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously" (*a*).

Trespass will not lie against commissioners of bankrupts, for a commitment by them for not answering to their satisfaction lawful questions proposed by them to a party whom they have authority

(*p*) *Groome v. Forrester*, 5 M. & S. 314.

(*q*) *Strickland v. Ward*, 7 T. R. 633, n.; *Fawcett v. Fowles*, 7 B. & C. 394.

(*r*) See 11 & 12 Vict. c. 44, s. 2, *post*, p. 854, as to a constable's immunity when he acts under a warrant issued without jurisdiction. See 24 Geo. II. c. 44, s. 6, *post*, p. 857.

(*s*) *Jones v. Gurdon*, 2 Q. B. 600.

(*t*) *Baylis v. Strickland*, 1 M. & G. 591.

(*u*) *Mann v. Davers*, 3 B. & Ald. 103.

(*x*) *Davis v. Capper*, 10 B. & C. 38.

(*y*) *Cave v. Mountain*, 1 M. & G. 257.

(*z*) *Per Cur.*, *R. v. Bolton*, 1 Q. B. 66.

(*a*) *Per Lord Abinger*, C. B., in *West v. Smallwood*, 3 M. & W. 420.

to examine, and upon a subject into which they have authority to inquire (b). But the commissioners have not authority to commit a person brought before them to be examined for giving an unsatisfactory answer to an immaterial question (c). A witness summoned by commissioners of bankrupts, (under the 6 Geo. IV. c. 16, s. 33,) was required by them to read certain entries in a ledger, and on his refusal to do so was committed by them for refusing to answer a question. It was held that the commitment was illegal, inasmuch as the request to read was neither in form nor in substance a question (d). But the Court of Bankruptcy is now one of record (e), with its concomitant power to commit for contempt, &c. (f); and a commissioner of bankruptcy, like all other judges of a special and limited jurisdiction, is now only liable in trespass for acting without the special jurisdiction given to him by the statutes of bankruptcy (g); where he is not misinformed as to the facts upon which the want of jurisdiction depends (h).

The clerk of a County Court is a mere ministerial officer to carry into effect the order of the judge, and is not liable in trespass for the imprisonment of a party under a warrant signed and issued by him in the mere performance of the duty cast upon him by the statute, although the order of the judge upon which the warrant is founded, is bad; for he is bound to obey the orders of his superior, if formally given (i). But the judge of a County Court is answerable in an action of trespass and false imprisonment, for an act done by his command, where he has no jurisdiction, and is not misinformed as to the facts on which his jurisdiction depends (k). An infant under the age of seven years cannot incur the guilt of felony, and therefore in an action by his next friend for false imprisonment a plea of felony is no defence (l).

An action for false imprisonment will lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and continued beyond ordinary bounds (m). So where a captain of a man-of-war imprisoned a person three days for a supposed breach of duty, without hearing him, and then released him without bringing him to a court-martial (n).

(b) *Doswell v. Impey*, 1 B. & C. 163.

(c) *Exp. Baxter*, 7 B. & C. 673.

(d) *Isaac v. Impey*, 10 B. & C. 442.

(e) 12 & 13 Vict. c. 106, s. 6; 5 & 6 Vict. c. 122, s. 66.

(f) See *Green v. Elgie*, 5 Q. B. 99. But a magistrate cannot commit for contempt without a warrant. *Mayhew v. Locke*, 7 Taunt. 63.

(g) *Watson v. Bodell*, 14 M. & W. 57.

(h) See *Calder v. Halkett*, 3 Moore's P. C. C. 76.

(i) *Dews v. Riley*, 11 C. B. 434.

(k) *Houlden v. Smith*, 14 Q. B. 841.

(l) *Marsh v. Loader*, 14 C. B. (N. S.) 535.

(m) *Wall v. M'Namara*, cited 1 T. R. 536.

(n) *Swinton v. Molloy*, cited 1 T. R. 537.

II. *Statutes relating to the Action for False Imprisonment.*

By 11 & 12 Vict. c. 44, s. 2,—For any act done by a J. P., “in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction” (o), any person injured thereby, or by any conviction (p), order, or warrant issued by such justice, may maintain an action in the same form as he might have done before the passing of the act (*viz.* trespass for false imprisonment (q)), without alleging malice or want of reasonable cause in the declaration, provided that no such action shall be brought until after the conviction or order has been quashed;—and if, on a warrant to appear before the justice, there has been no such conviction or order—or if the warrant be for an indictable offence, and a summons has been duly served, and the person summoned has neglected to appear—in such case no action can be maintained against the justice for anything done under the warrant. Where the plaintiff in trespass was convicted in a penalty (under the 29 Car. II. c. 7, s. 1), by the defendant, a J. P., and the conviction ordered a distress of the plaintiff’s goods, which was within the justice’s jurisdiction, *and also* that, in default of sufficient distress, the plaintiff should be put in the stocks for two hours, unless the sum was paid sooner,—which was held to be illegal, and the conviction was quashed on that ground,—it was adjudged that the defendant was protected by the first section, and that the second section did not apply, the illegal alternative not having been acted upon (r). But where the warrant was to levy costs, the conviction not mentioning them, the magistrates were held liable in trespass, under the above section (s).

By sect. 3,—Where the conviction is by one justice, and the warrant of distress, or commitment by another, the action is to be against the convicting justice. By sect. 4, in cases where a discretionary power shall be given to a J. P. by any act or acts of parliament, no action is to be brought against him for the manner in which he shall exercise his discretion in the execution of such power; nor, by sect. 5, for anything done in obedience to a rule of the Court of Queen’s Bench; nor, by sect. 6, for anything done under a warrant, by reason of any defect in the conviction or order, if the conviction or order have been confirmed on appeal. By sect. 8, no action shall be brought against a J. P. for anything done by him “in the execution of his office,” (see *post*, p. 859)

(o) Actions against justices for matters *within* their jurisdiction must be in *case*, and malice and the want of reasonable or probable cause must be both alleged and proved. Sect. 1.

(p) What is a conviction, and when

complete, see *Massey v. Johnson*, 12 East, 68; *Charter v. Grame*, 13 Q. B. 216.

(q) *Jones v. Gurdon*, 2 Q. B. 600.

(r) *Barton v. Bricknell*, 13 Q. B. 393.

(s) *Leary v. Patrick*, 15 Q. B. 266.

unless it be commenced within six calendar months next after the act complained of.

By sect. 9,—“No action shall be commenced against any *such* justice (*i. e.* a justice acting in the execution of his office), until one calendar month at least (*t*), after notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party so intending to sue, and also the name and place of abode or of business of the said attorney or agent, if such notice have been served by such attorney or agent” (*u*).

The proof of notice of action is a necessary part of the plaintiff's case, and must be given by him though the want of it be not relied upon in pleading by the defendant (*x*).

The form prescribed by the statute should be strictly adhered to (*y*). The notice must specify the time and place at which the act complained of occurred (*z*); it is not enough that it names the day only; and the omission to specify the place is not cured by the magistrate pleading a tender of amends (*a*). It is not necessary, however, that the *form of action* should be stated in the notice (*b*); but the plaintiff having given notice of one form of action cannot declare in another. Plaintiff gave notice of an action *on the case* for false imprisonment, and afterwards brought an action of *trespass* and false imprisonment. *Yates, J.*, held the notice insufficient, as tending to mislead the J. P., who might know that an action on the case was improper, and such whereon the plaintiff might be nonsuited, and neglect to tender amends (*c*). But where the notice given was of an action against a magistrate alone, it was held sufficient to warrant proceedings against the magistrate and constable jointly (*d*). Where the subject-matter is within the

(*t*) *i. e.*, exclusive of the day of giving the notice, and the day of suing out the writ. *Young v. Higgon*, 6 M. & W. 49. Where an act is required by a statute to be done so many days *at least* before a given event, the time must be reckoned, excluding both the day of the act and that of the event. *R. v. Justices of Shropshire*, 8 A. & E. 173; for the rule is now clearly established, that so many days “at the least,” mean so many clear days. *Mitchell v. Foster*, 12 A. & E. 472; *Chambers v. Smith*, 12 M. & W. 2. By the 5 & 6 Vict. c. 97, s. 4, in all cases where notice of action is required, such notice of action shall be given one calendar month at least before any action

shall be commenced; and such notice shall be sufficient, any act or acts to the contrary thereof notwithstanding.

(*u*) A somewhat similar enactment was contained in the 24 Geo. II. c. 44, s. 1, under which the following cases were decided.

(*x*) *Lawrenson v. Hill*, 10 Ir. C. L. R. 498.

(*y*) *Lovelace v. Curry*, 7 T. R. 631.

(*z*) *Breese v. Jerdein*, 4 Q. B. 585.

(*a*) *Martins v. Upcher*, 3 Q. B. 662.

(*b*) *Prickett v. Gratrex*, 8 Q. B. 1020.

(*c*) *Strickland v. Ward*, 7 T. R. 631, *in notâ*.

(*d*) *Jones v. Simpson*, 1 Cr. & J. 174.

jurisdiction of the magistrate, and he intends to act as a magistrate at the time, however mistaken he may be, he is still within the protection of the statute. Hence, where *one* magistrate committed the mother of a bastard to custody for not fliating; it was held, that such magistrate was entitled to notice, although the 18 Eliz. c. 3, s. 2, only gave jurisdiction in such matter to *two* justices of the peace (*e*). So where a magistrate acts upon a subject-matter of complaint over which he has authority, but which arises out of his jurisdiction, he is entitled to notice (*f*). See *post*, p. 859.

A notice written by the attorney, and signed by him thus: "Given under my hand at Durham;" was held insufficient, because it did not expressly state that Durham was the place of the attorney's residence (*g*). But a notice, indorsed with the name of the plaintiff's attorney, with the addition of the words "of Birmingham," has been held sufficiently descriptive of the attorney's place of abode (*h*). A description of an attorney as of "New Inn, London," New Inn being in Westminster, was held ill (*i*). So it is sufficient in indorsing the attorney's name to put the initial only of his christian name: as where the indorsement was thus, "D. Shuter," with the place of abode in words at length (*k*). So where one christian name was omitted (*l*). So where the notice was signed in the name of the firm "Donne and Cox" (*m*). The service need not be made by the attorney himself; service by his clerk is sufficient (*n*).

By sect. 11,—Such J. P. may, after notice and before action, tender amends to the party complaining, or to his attorney; and after action has been commenced, and at any time before issue joined, the defendant, if he have not made any tender, or in addition to such tender, may pay into court such sum of money as he thinks fit; which tender and payment, or either of them, may be given in evidence at the trial under the general issue, and if the jury are of opinion that the plaintiff is entitled to no more damages than the sum so tendered *or* paid, or so tendered *and* paid, they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuited, &c.

By sect. 12,—If at the trial the plaintiff shall not prove that the action was commenced within the time limited, or that such notice was given one calendar month before action, or if he shall not prove the cause of action stated in such notice, or that it arose in the place laid as the venue, the plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant.

(*e*) *Weller v. Toke*, 9 East, 364.

(*f*) *Prestidge v. Woodman*, 1 B. & C.

12.

(*g*) *Taylor v. Fenwick*, 3 Doug. 178.

(*h*) *Osborn v. Gough*, 3 B. & P. 551.

(*i*) *Stears v. Smith*, 6 Esp. 138.

(*k*) *Mayhew v. Locke*, 7 Taunt. 63.

(*l*) *James v. Swift*, 4 B. & C. 681.

(*m*) *Wood v. Folliott*, 3 B. & P. 552, n.

(*n*) *Morgan v. Leach*, 10 M. & W. 558.

By sect. 13, in cases where the plaintiff is entitled to recover, if he shall prove the payment of any penalty, &c., as parcel of the damages he seeks to recover, or that he was imprisoned, he shall not be entitled to recover the amount of such penalty or more than 2*d.* as damages for the imprisonment, or any costs, if it be proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (as to the imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

By 24 Geo. II. c. 44, s. 6,—“No action (*o*) shall be brought against any constable, headborough, or other officer, or against any person acting by his order and in his aid, for any thing done *in obedience* to any warrant under the hand or seal of any J. P. (*p*), until demand has been made or left at the usual place of his abode, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand : and in case, after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as aforesaid, without making the J. P. who signed or sealed the warrant, defendant, on production and proof of such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such J. P. ; and if such action be brought jointly against such J. P. and such constable, &c., then, on proof of such warrant, the jury shall find for such constable, &c., notwithstanding such defect of jurisdiction ; and if the verdict be given against the J. P., the plaintiff shall recover his costs against him, to be taxed in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom such verdict is found (*q*). A similar protection is extended to messengers acting in obedience to warrants of commissioners of bankrupts, by 12 & 13 Vict. c. 106, s. 107 ; but under a warrant to seize the goods or person of A., the messenger is not protected by it in seizing the goods or person of B. (*r*).

(*o*) The word “action” here does not apply to a proceeding “*in rem*,” such as replevin. *Fletcher v. Wilkins*, 6 East, 283.

(*p*) A Secretary of State is not a justice of the peace within the statute, and, therefore, his warrant, if bad, will not justify the officer who executes it, nor is it necessary to demand a copy of the warrant before the bringing of an action. So a king's officer is not within the statute,

which means to protect those officers only, who are bound to execute warrants directed to them, as constables, &c. *Entick v. Carrington*, 2 Wils. 290.

(*q*) This section extends (*semble*) to actions of assumpsit to recover back money illegally extorted. *Waterhouse v. Keen*, 4 B. & C. 200 ; but see *Feltham v. Terry*, Bull. N. P. 24.

(*r*) *Munday v. Stubbs*, 10 C. B. 432.

Churchwardens (s), and overseers of the poor (t), acting under a magistrate's warrant of distress for a poor's rate, are within the meaning of the words "other officer" in the statute 24 Geo. II. c. 44, and consequently entitled to the protection which it affords, when sued in those actions to which the statute extends, *e. g.* trespass, &c. So is a gaoler (u). A duplicate original of demand is sufficient evidence (x); and if signed by the attorney, is sufficient within the meaning of the section (y); and may be left by his clerk (z). A constable is within the protection of the above section, who has complied with the plaintiff's demand before action, though not within six days after demand (a). Where on a demand of perusal and a copy of the warrant, the defendant gave a copy, saying, as the fact was, that the original was in the hands of the gaoler, and the plaintiff's agent made no objection, it was held, that the plaintiff had, by his conduct, dispensed with a literal compliance with the statute (b). But where the constable did not comply with the demand, although the plaintiff had received a copy of the warrant from other parties, it was held, that the constable was not within the protection of the section, although the justice was joined with him in the action (c). A demand of perusal and copy within *three* days is good (d).

The officer must prove that he acted *in obedience* to the warrant; and where the J. P. cannot be liable, the officer is not entitled to the protection of the above section. "The act was meant to make the justice liable instead of the officer: where, therefore, the officer makes such a mistake as will not make the justice liable, the officer cannot be excused" (e). Hence, an officer executing a warrant of a justice of Norfolk at large, in the county of the city of Norwich, was held not to be justifiable (f). So where, under a warrant to take up loose and disorderly persons, the constable took up a woman of character (g). So where the warrant was to take up the authors, printers, and publishers of a libel, and the officers took up persons who did not fall under any of those descriptions (h). So where, under a warrant against the goods of A., the defendant, an overseer, took goods already in the hands of the bailiff of A.'s landlord as a distress for rent (i). A perusal and copy of the warrant need not be demanded where the officer does not act within his jurisdiction in obedience to the warrant (k). But if the officer act in obedience to the warrant, it is immaterial whether the war-

(s) *Harper v. Carr*, 7 T. R. 271.

(t) *Nutting v. Jackson*, Bull. N. P. 24.

(u) *Butt v. Newman*, 1 Gow. 97.

(x) *Jory v. Orchard*, 2 B. & P. 39.

(y) *Ib. per Buller, J.*

(z) *Clark v. Woods*, 2 Exch. 395.

(a) *Jones v. Vaughan*, 5 East, 446.

(b) *Atkins v. Kilby*, 11 A. & E. 777.

(c) *Clark v. Woods*, 2 Ex. 395.

(d) *Collins v. Rose*, 5 M. & W. 194.

(e) *Money v. Leach*, 3 Burr. 1766; 1 W. Bl. 555; *Milton v. Green*, 5 East, 233; *Bell v. Oakley*, 2 M. & S. 259.

(f) *Anon.*, cited 1 W. Bl. 563.

(g) *Dawson v. Clerk*, cited 1 W. Bl. 563.

(h) *Money v. Leach*, 3 Burr. 1766.

(i) *Kay v. Grover*, 7 Bingh. 312.

(k) *Per Parke, B., Gladwell v. Blake*, 1 C. M. & R. 645.

rant be legal or not. If the warrant direct the officer to seize "stolen goods," and he seizes goods which fall within the description contained in the warrant in other respects, although they turn out not to be stolen, he is still under the protection of the statute (*l*). *Secus*, if the warrant specifies the goods (*m*).

By sect. 8,—No action shall be brought against any constable, &c., for anything done in the execution of his office, unless commenced within six calendar months after the act committed. This section is more extensive in its protection than the sixth, for under it a constable is protected, although he do not act "in obedience to" a warrant. A constable acting under a warrant commanding him to take the goods of A., took the goods of B., believing them to belong to A.: it was held, that he was entitled to the protection of this section, and that an action against him must be brought within six calendar months (*n*).—"*Parton v. Williams* points out the precise distinction between the two sections of the 24 Geo. II. c. 44, and discriminates between the absolute protection given by the eighth section and the minor degree of protection afforded by the sixth;" *per Talford, J.* (*o*). In one case (*p*) it was held, that the section did not protect a constable acting without a warrant, but this case was commented on in a succeeding case (*q*); and in a later case (*r*), it was held, that the constable of *W.*, acting under a warrant directed to the constable of *D.*, was within the section (*s*).

Where a constable was appointed under a local act, which gave a notice of twenty-one days before action could be brought for any thing done in pursuance of the act, and executed a warrant under the powers of another general act of parliament which gave no such protection, he was held not to be entitled to notice of action (*t*).

If a man be imprisoned by a warrant of a J. P. on the 1st day of January, and kept in prison till the 1st day of February, he may bring his action within six months after the 1st of February, for the whole is one entire trespass (*u*). "Every continuance of the imprisonment is, in point of law, a new imprisonment;" *per Bayley, J.* (*x*); in which case the question was moved, whether the last day of the imprisonment was to be considered as inclusive or exclusive. The month's imprisonment terminated on the 14th of December, and the writ was sued out on the 14th of June following; it was held, that the 14th of December ought to be excluded in computing the six months, and consequently that the action was commenced

(*l*) *Price v. Messenger*, 2 B. & P. 158.

(*m*) *Crozier v. Cundley*, 6 B. & C. 232.

(*n*) *Parton v. Williams*, 3 B. & Ald. 330; *Smith v. Wiltshire*, 2 B. & B. 619, *acc.*

(*o*) *Munday v. Stubbs*, 10 C. B. 440.

(*p*) *Postlethwaite v. Gibson*, 3 Esp. 226.

(*q*) *Parton v. Williams*, 3 B. & Ald. 330.

(*r*) *Freegard v. Barnes*, 7 Exch. 827.

(*s*) See *Ballinger v. Ferris*, 1 M. & W. 628.

(*t*) *Shatwell v. Hall*, 10 M. & W. 523.

(*u*) *Pickersgill v. Palmer*, Bull. N. P. 24.

(*x*) *Hardy v. Ryle*, 9 B. & C. 609. See further, *ante*, p. 855, n.

in due time. But if the plaintiff give notice during the imprisonment he must commence the action within six months from that time (y).

Where a statutory protection is given to persons having acted "in pursuance of" or "in execution of or under the authority of" a statute,—e.g. by entitling them to notice of action, or a verdict, if tender of amends be made, &c.—a party is entitled to the protection, if he believe, *bonâ fide* and reasonably, i.e. with some colour of reason, and as distinguished from mere caprice, that he is acting in pursuance or in execution of the statute (z). If the party acted under a reasonable though mistaken persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification (a). So where a magistrate, with some colour of reason, and *bonâ fide* believing that he is acting in pursuance of his lawful authority, proceeds illegally, or exceeds his jurisdiction (b). Reasonableness is in fact an ingredient in enabling the court (or the jury) to arrive at a conclusion as to the *bona fides* of the party (c). "It is not, however, because a man chooses to think himself acting under a statute, that he can by such mere fancy of his own protect himself in an action" (d). If the act done is such, that no reasonable man could, in doing it, be supposed to have acted *bonâ fide*, he is not entitled to the protection, as where the 5 & 6 Will. IV. c. 59, gave authority to the owner of a horse to give in charge a person guilty of cruelty towards it, and the defendant, the son of the owner, gave the party in charge, it was held, that he must be taken to know the law, and could not have any reasonable ground for believing himself to be the owner, and therefore was not protected (e). In that case, it will be observed, the defendant *must* have known he did not fill the character empowered by the act then in question to take persons into custody. Where, however, the defendant may or may not fill the character, as where an act empowered the owner of property injured, "or his servant, or any one authorized by him," to take persons into custody, it is a question for the jury, in addition to the defendant's *bona fides* generally, (or rather, perhaps, as a *necessary* ingredient in it (f)), whether he reasonably believed himself to fill that character; to have had the owner's authority, &c. (g). *Bona fides* and reasonable belief are questions for the jury under all the circumstances, if there be any evidence of them, and the plaintiff

(y) *Weston v. Fournier*, 14 East, 492.

(z) *Booth v. Olive*, 10 C. B. 827.

(a) *Cann v. Clipperton*, 10 A. & E. 582.

(b) *Hazeldine v. Grove*, 3 Q. B. 997.

(c) *Per Rolfe, B., Horn v. Thornborough*, 3 Exch. 850.

(d) *Per Patteson, J., in Cann v. Clipperton*, 10 A. & E. 582.

(e) *Hopkins v. Crowe*, 4 A. & E. 774.

(f) See *per Maule, J., Read v. Coker*, 13 C. B. 863.

(g) *Kine v. Evershed*, 10 Q. B. 143.

desires the opinion of the jury to be taken on them, although it is very common to submit them to the judge first on an application for a nonsuit. And if the plaintiff, on such application being made, does not desire the matter to be submitted to the jury, he must abide by the decision of the judge, if the court shall think it warranted by the evidence (*h*).

The 33rd section of the 24 & 25 Vict. c. 99 (the act for consolidating the law against offences relating to the coin) requires a month's notice of action to be given before bringing an action against any person for anything done in pursuance of that act. In order to entitle a party to notice of action under this statute, it is enough if he really believes that the facts existed which would bring the case within the statute, and if he honestly intends to put the law in force, although there is no reasonable cause for such belief (*i*).

So the 47th section of 6 & 7 Vict. c. 86 (the Hackney Carriage Act) entitles a party sued for anything done under the act to notice of action, but to entitle him to such notice he must honestly intend to put the law in motion, and really believe in the existence of a state of facts which if they existed would justify him under the statute in doing the act for which he is sued (*k*).

And this last is now well settled as being the test whether a defendant is entitled to notice of action in respect of a thing done pursuant to a statute (*l*).

III. *Of the Pleadings.*

Venue.—By 21 Jac. I. c. 12, s. 5,—If any action for false imprisonment shall be brought against any mayor, or bailiff of city or town corporate, headborough, portreeve, constable, tithing-man, churchwarden, or overseer of the poor, and their deputies, or any other (who in their aid, or by their commandment, shall do anything concerning their office), concerning anything by them done by virtue of their office, such action shall be laid within the county where the trespass was committed, and not elsewhere; and if, upon the trial, the plaintiff shall not prove that the trespass was committed within the county where the action is laid, then the jury shall find the defendant, without any regard to the plaintiff's evidence, *not Guilty*. The provisions of the preceding statute were, by 42 Geo. III. c. 85, s. 6, extended to all persons holding a public employment, or any office, civil or military, either in or out of the kingdom, and who, by virtue of such employment, have power to commit persons to safe custody; provided, that where any action

(*h*) *Hazeldine v. Grove*, 3 Q. B. 997.

(*k*) *Heath v. Brewer*, 15 C. B. (N. S.) 803.

(*i*) *Hermann v. Seneschal*, 13 C. B. (N. S.) 392; 32 L. J., C. P. 43.

(*l*) *Roberts v. Orchard*, 33 L. J. Ex. 66, in error.

shall be brought against such persons in the kingdom, for anything done out of the kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside. In actions against justices of the peace, the venue must be laid in the county where the act complained of was committed, 11 & 12 Vict. c. 44, s. 10. If, since the division of the county of Lancaster (by 3 & 4 Will. IV. c. 71, s. 4), the venue in such an action be laid in "the southern division," but it appear that the cause of action arose in "the northern division," the defendant will be entitled to a verdict (*m*).

The general issue to an action for false imprisonment is, Not Guilty. By 21 Jac. I. c. 12, s. 5, in an action upon the case, trespass, battery, or false imprisonment, against a mayor, bailiff, constable, &c., for anything done by virtue of their offices, or against any other persons acting in their aid, and by their command, concerning their offices, the defendant may plead the general issue, and give the special matter in evidence. By 42 Geo. III. c. 85, s. 6, the provisions of the preceding statute were extended to all persons holding a public employment or office, civil or military, who, by virtue of such employment, have power to commit persons to safe custody. By 11 & 12 Vict. c. 44, s. 10, justices of the peace have the like privilege. But by 21 Pl. R., T. T. 1853, unless the defendant insert in the margin of such plea the words, "by statute," together with the year or years of the reign in which the act or acts were passed, and the chapter and section of each act, specifying whether they are public or otherwise, such plea is to be taken not to have been pleaded by virtue of any act of parliament. The plea of the general issue, "by statute," cannot be pleaded together with special pleas (*n*). Where a statute enables the defendant to plead the general issue, and give the special matter in evidence, the plea of Not Guilty, so pleaded, is not affected by the pleading rules of T. T. 1853; but puts in issue not only the defences peculiar to the statute, but all that would have arisen at common law (*o*). In other cases, matter of justification must be pleaded specially (*p*).

Every plea of justification must admit the trespass. To an action for false imprisonment brought by A. against B., C. and D., they pleaded a plea of justification, under process, wherein B. said, that he, as attorney for the plaintiff in the original action, delivered the warrant made by the sheriff upon the process to C. and D. as his bailiffs, to be executed in due form of law, and that C. and D. thereupon arrested the plaintiff A., and detained him in prison. This was held to be a sufficient admission by B. of the trespass,

(*m*) *Atkinson v. Hornby*, 2 C. & K. 335.

(*n*) *Legge v. Boyd*, 1 M. & G. 898;
see *ante*, tit. "Assault and Battery,"
Pleadings.

(*o*) *Ross v. Clifton*, 11 A. & E. 631.

See *Williams v. Jones*, 11 A. & E. 643.

(*p*) *Coomer v. Latham*, 16 M. & W.
713.

for the purpose of his justification; for he who commands or directs another to do a trespass is guilty of the trespass, if done by the other person pursuant to his direction (*q*).

To trespass for false imprisonment, the defendant may plead that he did it by lawful authority. It is a general rule of pleading, that where a party justifies a trespass under an authority given, he must show that authority (*r*). There is a difference, however, in this respect, where the justification is under judicial process, between the party to the cause, or a mere stranger, and the officer who executes the process of the court. The party to the cause, or mere stranger, must set forth in their plea the judgment (*s*), as well as the writ; but the officer need only show the writ under which he acted, for he is bound to execute the process of the court, having competent jurisdiction, without inquiring after the judgment (*t*). And it is to be observed, that where the party to the cause and the officer join in pleading, the plea must contain all the requisites which would be necessary in case they had pleaded separately; for it is a general rule, that where two or more join in a defence, although the justification may be sufficient for one or more, yet if it be not sufficient for the rest, it will be bad as to all the defendants (*u*). Where final process, *e. g.*, a *fi. fa.* or *ca. sa.*, issues, a return is not necessary (*x*); consequently, it is not necessary to allege that such process was returned (*y*), unless any ulterior process in execution is to be resorted to, to complete the justification, there it may be necessary to show to the court the return of the prior writ, in order to warrant the issuing of the other (*z*). But an officer who justifies under process, which he ought to return (and all mesne process ought to be returned), must show that such process was returned (*a*). "There is a difference, however, between the principal officer, to whom the writ is directed, and a subordinate officer; the former shall not justify under the process, unless he has obeyed the order of the court in returning it; otherwise, it is of one who has not the power to procure a return to be made." *Per Holt, C. J.* (*b*).

Such are the rules of pleading, where the justification is founded on process out of the superior courts: but in justifying under process issuing out of inferior courts greater strictness is required; as, 1. The nature and extent of the jurisdiction of the court below

(*q*) *Rowe v. Tutte*, Willes, 14.

(*r*) 1 Inst. 283, a.; *Matthews v. Cary*, 3 Mod. 137; Carth. 73.

(*s*) *Per Holt, C. J.*, *Britton v. Cole*, Carth. 443; Salk. 409.

(*t*) *Turner v. Felgate*, 1 Lev. 95; *Cotes v. Michill*, 3 Lev. 20; and therefore, if the process be of an inferior court the jurisdiction must be shown. *Morrell v. Martin*, 3 M. & G. 581.

(*u*) *Phillips v. Biron*, 1 Str. 509; *Smith v. Bouchier*, 2 Str. 993; *Middleton v. Price*, 2 Str. 1184.

(*x*) *Hoe's case*, 5 Rep. 90.

(*y*) *Rowland v. Veale*, Cowp. 18, recognized in *Cheasley v. Barnes*, 10 East, 73.

(*z*) *Per Lord Ellenborough, S. C.*

(*a*) *Middleton v. Price*, Str. 1184.

(*b*) *Freeman v. Blewett, Ltd.* Raym. 634; *Britton v. Cole*, Salk. 409, *acc.*

ought to be set forth, for the judges of the superior courts are not bound to take cognisance of it (c). 2. It ought to be stated that the cause of action below arose within the jurisdiction of the court below (d). Merely setting out in the plea the declaration in the court below, containing an averment that the cause of action arose within the jurisdiction, is not sufficient, for such averment is not traversable (e). There is no distinction between an officer of the court below and a party to the cause below in these respects; *Morse v. James*, Willes, 128; where it was held, that though an officer may justify under erroneous process, yet it must appear that the process issued in a cause wherein the court below had jurisdiction (f): It is not, however, necessary to set forth the cause of action; *Rowland v. Veale*, Cowp. 18, recognized in *Belk v. Broadbent*, 3 T. R. 183, where the same doctrine was applied to a justification under mesne process issuing out of a superior court, and in which the defendant merely stated, that the writ upon which the plaintiff had been arrested had been issued upon an affidavit to hold to bail, without stating any cause of action for which the plaintiff was liable to be arrested. 3. Before the time of Charles the Second, it was necessary to set forth the proceedings in the inferior court at length (g); but now they may be set out shortly with a *taliter processum est* (h). Where, however, a party justifies under process, to the legality of which some precedent process is necessary, an allegation that the precedent process duly issued must be made (i); or the plea must be so framed that the court may fairly intend that the precedent process duly issued (k).

In justifying a trespass under the process of a foreign court, it seems that the plea should be framed in analogy to similar justifications under the process of our inferior courts; a plea which only stated that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question, in such court having competent jurisdiction in that behalf, *et taliter processum, &c.*, that the defendant was ordered, by the said court having competent authority in that behalf, to seize the property, was held bad, on special demurrer, as being too general, and not giving the plaintiff notice, whether the defendant justified as an officer of the court, or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque, &c.* (l).

(c) *Moravia v. Stoper*, Willes, 37.

(d) *Evans v. Munkley*, 4 Taunt. 50.

(e) *Adney v. Vernon*, 3 Lev. 243.

(f) See *Morrell v. Martin*, 3 M. & G. 581; *Andrews v. Marris*, 1 Q. B. 3; *Carratt v. Morley*, 1 Q. B. 18; and cases cited *ante*, pp. 850, 851.

(g) *Johnson v. Warner*, Willes, 530, n.

(h) *Patrick v. Johnson*, 3 Lev. 403; 1 Wms. Saund. 92, n. (2).

(i) See *Bruce v. Wait*, 1 M. & G. 1.

(k) *Titley v. Foxall*, Willes, 688.

(l) *Collett v. Lord Keith*, 2 East, 260.

Process ought to describe accurately the party against whom it is issued, and the arrest of A. B. cannot generally be justified under a writ sued out against C. B. (*m*) (see *ante*, p. 846). But it is sufficient to allege in the plea a justification under process against "the now plaintiff," without otherwise describing him, and this justification is established by the production at the trial of a *ca. sa.* against the now plaintiff by another name, and proof that in the former action the now plaintiff was the party sued under such name, or that he was known by one name as well as the other (*n*). In trespass for false imprisonment by A. B., the defendant pleaded, that J. S. sued out process *against the plaintiff*, A. B., therein called C. B., directed to the sheriff, and authorizing him to arrest C. B., &c., who directed his warrant to the defendant, and thereby commanded him to take *the said A. B., therein called by the name of C. B., &c.*, concluding with an averment that the said A. B. and C. B., in the writ and warrant mentioned, were *one and the same person*. On demurrer, the plea was held bad (*o*), Lord *Ellenborough*, C. J., observing, that this case was exactly the same in principle as *Cole v. Hindson*, 6 T. R. 234; and *Lawrence*, J., said,—"*In Cole v. Hindson*, Lord *Kenyon* observed, that there was not any averment that the plaintiff was as well known by the one name as the other; neither was there any such averment in this case."

A constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities, although it appear afterwards that a felony has not been committed (*p*).

Thus he may justify an arrest without a warrant on a reasonable charge of felony, although it should afterwards appear that a felony had not been committed (*q*). "If a person comes to a constable and says of another, *simpliciter*, 'I charge this man with felony,' that is a reasonable ground, and the constable ought to take the person charged into custody. But if from circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but he is responsible for so doing."—*Per Bramwell*, B. A travelling showman, saw the plaintiff, a master butcher, in possession of certain harness; and thereupon told the defendant, a police-constable, that it was harness which had been stolen from him a year ago, and directed him to take the plaintiff into custody, but he did not go with the defendant, nor make any

(*m*) *Hoye v. Bush*, 1 M. & G. 775.

(*n*) *Fisher v. Magnay*, 5 Q. B. 778. As between the plaintiff and defendant in such an action the circumstance of the plaintiff having given the wrong name on one occasion would seem to be sufficient. *Per Holroyd*, J., in *Morgan v. Bridges*, 1 B. & Ald. 652; and see *Brunskill v. Robertson*, 9 A. & E. 840.

(*o*) *Shadgett v. Glipson*, 8 East, 328.

(*p*) *Beckwith v. Philby*, 6 B. & C. 635; *Nicholson v. Hardwick*, 5 C. & P. 495.

(*q*) *Samuel v. Payne*, Doug. 359; *Hobbs v. Branscomb*, 3 Campb. 420. *Secus* in the case of misdemeanors. *Coupey v. Henley*, 2 Esp. 540. See *post*, p. 868.

charge of felony. The harness was used openly, and the plaintiff, when asked by the constable, said he had bought it from a person he did not know for a shilling. The constable had known the plaintiff for twenty years. It was held that there was no *reasonable* ground of suspicion sufficient to justify the constable in arresting the plaintiff (r). A constable cannot generally arrest a person on a charge of misdemeanor after it is over (s); and even an inspector who took such a charge would be liable to an action for continuing the imprisonment of one thus illegally arrested (t). A constable may, however, arrest a man if he have reasonable ground for believing that an affray will be renewed (u).

Watchmen and beadles have authority at common law to arrest, and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed (x). So they may take up female street-walkers (y).

The Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 64, authorizes "any constable belonging to the Metropolitan police to take into custody, without a warrant, all persons whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor or breach of the peace."

In general, where an affray takes place in the presence of a constable, he may keep the parties in custody until the affair is over, or he may carry them immediately before a magistrate (z). But to justify a constable in apprehending a party without a warrant for an affray, it is essential that the party should have been engaged in the affray, and that the constable should have had view of the affray, while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension or was likely to be continued (a).

But when a *private person* apprehends another on suspicion of felony, he does it at his peril, and is liable to an action, unless he can establish in proof that a felony had been actually committed by some one, and that he had reasonable ground for supposing that the party arrested was the person who had committed it (b). Proof of mere suspicion of a felony, though reasonable, will not bar such an action, although it may be given in evidence in mitigation of damages (c); as also many facts, which, although true, would not justify an arrest; as where the defendant gave the plaintiff into cus-

(r) *Hogg v. Ward*, 27 L. J., Exch. 443; 3 H. & N. 417.

(s) *Fox v. Gaunt*, 3 B. & Ad. 798.

(t) *Griffin v. Colman*, 28 L. J. Ex. 134.

(u) *Timothy v. Simpson*, 1 C. M. & R. 762.

(x) *Lawrence v. Hedger*, 3 Taunt. 14.

(y) *R. v. Bootie*, 2 Burr. 164.

(z) *Churchill v. Matthews and others*, Somerset Sum. Ass. 1808, Bayley, J.

(a) *Cook v. Nethercote*, 6 C. & P. 741; *Baynes v. Brewster*, 2 Q. B. 375.

(b) *Allen v. Wright*, 8 C. & P. 522; *Matthews v. Biddulph*, 3 M. & G. 390.

(c) *Cowles v. Dunbar*, 2 C. & P. 565; *Chinn v. Morris*, Ry. & M. 424; *Busst v. Gibbons*, 30 L. J. Ex. 75.

tody on a charge of fraudulently heaping up mounds of earth, to make it appear that he was entitled to receive from the defendant a larger sum than was due for work contracted to be done (*d*). A plea justifying an arrest by a private person, on suspicion of felony, must show the circumstances, from which the court may judge whether the suspicion were reasonable (*e*); the question of reasonable and probable cause being matter of law for the judge to decide, the truth of the facts proved, and the justice of the inferences to be drawn from such facts, being only for the consideration of the jury (*f*). Suspicion that a person has on a former occasion committed a misdemeanor is not any justification for giving him in charge to a constable without a warrant; and there is not any distinction in this respect between one kind of misdemeanor and another, as between breach of the peace and fraud (*g*). Where in an action for false imprisonment it appeared that the defendant had given the plaintiff in charge on the evidence of H. as to what R. had told him, and that defendant had not made any inquiry of H. as to its truth, the judge ruled that there was no probable cause, which ruling was upheld (*h*). Where to an action of trespass for false imprisonment the defendant pleaded, that the plaintiff had committed a felony, and at the trial the plea was abandoned, it was held, that this was such a persisting in the charge contained in it as could be taken into account by the jury in estimating the damage (*i*).

Where a warrant is directed to a constable in his official character, without naming him, as, "To the constable of the parish of W.," the warrant ought to be executed within the limits of the district for which he is constable (*k*). But by 5 Geo. IV. c. 18, s. 6, such warrants granted by any justice of the peace may be executed by constables, &c., out of their districts, if within the jurisdiction of the justice granting the warrant (*l*). "If a warrant be directed to a constable by name, commanding him to execute it, though he is not compellable to go out of his own precinct, yet he may if he will, and shall be justified by the warrant for so doing; but if the warrant be directed to all constables, &c., generally, it shall be taken respectively, and no constable can execute the same out of his precinct" (*m*). A warrant of a magistrate may be executed out of his jurisdiction by getting it backed, *i. e.*, indorsed by a justice of the district in which it is to be carried into execution (*n*).

(*d*) *Linford v. Lake*, 27 L. J., Exch. 334.

(*e*) *Mure v. Kaye*, 4 Taunt. 34.

(*f*) *Panton v. Williams*, 2 Q. B. 169; *Hailes v. Markes*, 30 L. J., Ex. 389; 7 H. & N. 56.

(*g*) *Fox v. Gaunt*, 3 B. & Ad. 798.

(*h*) *Perryman v. Lister*, L. R., 3 Ex. 197, in error; 37 L. J., Ex. 166.

(*i*) *Warwick v. Foulkes*, 12 M. & W. 507. See *Wilson v. Robinson*, 7 Q. B. 68.

(*k*) *R. v. Weir*, 1 B. & C. 288.

(*l*) *Gladwell v. Blake*, 1 C. M. & R. 636.

(*m*) *Per Holt*, C. J., in case of *The village of Chorley*, Salk. 175.

(*n*) 11 & 12 Vict. c. 42, s. 11.

It is lawful for a private person to do anything to prevent the perpetration of a felony. Hence, the imprisonment of a husband by a private person, to prevent him committing murder on his wife is justifiable (o). So, if a man sees two persons fighting, lest by chance the one should kill the other, it is lawful for him to part them and imprison them until their fury be past (p). So, too, when their affray has ceased, any one may justify giving them into custody, so long as they show a disposition to renew it (q). Although any one who sees others fighting may lawfully part them and stay them until their passion be over, and then deliver them to a constable, still he may not imprison them himself (r).

Where the plaintiff, after abusing the defendant in his shop, went into the street outside, and there continued to abuse him, and a crowd collected, by which the street was much obstructed; it was held, that these facts amounted to a breach of the peace, and justified the defendant in giving the plaintiff in charge without a warrant (s). If a person, having made a lawful entry into another person's house, *e. g.* to demand a debt, refuses to depart, the owner of the house is justified in turning him out of the house, but not, it seems, in giving him into custody (t); unless he make such a noise and disturbance as would create alarm and disquiet the neighbourhood and the persons passing along the street (u). If, however, the original entry of the plaintiff be *forcible*, the owner would be justified, for that is a breach of the peace for which an indictment will lie (x). A violent rapping at the door by the plaintiff is not sufficient (y); and *per Tindal, C. J.*—"To make a good defence there should be a direct allegation, either of a breach of the peace committing at the time of giving the plaintiff into custody, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal."

Every one who takes upon himself the responsibility of imprisoning another, on the ground of insanity, must, in order to protect himself at common law, be able to show that the person so imprisoned was actually insane at the time. The stat. 8 & 9 Vict. c. 100, s. 99, protects in the case of an order for the confinement of a lunatic, all authorized persons acting under the certificate and order, and enables them to plead such certificate and order by way of defence to an action, but it gives no protection to the person making the order (z).

(o) *Handcock v. Baker*, 2 B. & P. 260.

(p) 2 Roll. Abr. 559, (E.) pl. 3.

(q) *Timothy v. Simpson*, 1 C. M. & R. 757.

(r) Lambard's *Eirenarcha*, c. 3, p. 130; Hawk. P. C. bk. 1, c. 63, s. 11, *acc*;

Timothy v. Simpson, 1 C. M. & R. 762.

(s) *Cohen v. Huskisson*, 2 M. & W. 477; as to disturbance in a theatre, *Clif-*

ford v. Brandon, 2 Campb. 358; in a church, *Worth v. Terrington*, 13 M. & W. 781.

(t) *Green v. Bartram*, 4 C. & P. 308.

(u) *Howell v. Jackson*, 6 C. & P. 723.

(x) *R. v. Wilson*, 8 T. R. 357.

(y) *Grant v. Moser*, 5 M. & G. 123.

(z) *Fletcher v. Fletcher*, 1 E. & E. 420.

A constable may justify under the general issue, although he acted without a warrant, provided there was a reasonable charge of felony made; although he afterwards discharges the prisoner without taking him before a magistrate, and although it should eventually appear that no felony was committed. But a private individual who makes the charge and puts the constable in motion, cannot justify under the general issue; he must plead the special circumstances, by way of justification, in order that it may be seen whether his suspicions were reasonable (*a*). If A. *direct* a constable to take B. into custody, the constable acts merely as his agent, and A. is liable to an action for false imprisonment, if he cannot prove a proper justification; but if he merely make a statement to the constable, leaving it to him to act or not as he thinks proper, B.'s remedy against A., if any, is in case (*b*). It would seem that the owner of property is not justified in giving a person into custody for committing a nuisance against his house, either under the Malicious Injuries Act (23 & 24 Vict. c. 97, s. 61), or the Metropolitan Police Act (2 & 3 Vict. c. 47, s. 54) (*c*).

If a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury. Hence, where to an action for false imprisonment against the sheriff, he pleaded, that, at the time when the trespass was committed, he was presiding as sheriff at an election of knights of the shire; and because the plaintiff assaulted him, and made a great noise and disturbance, and obstructed him in the execution of his duty, he ordered the constable to take the plaintiff into custody, &c.; and the jury found that the plaintiff did not assault the defendant, but that the other facts contained in the plea were proved; it was held, that that part of the plea which the jury had found constituted a good defence; for although the sheriff had not any authority to commit, yet it was his duty to preserve order and decency in the county court (*d*).

In an action for false imprisonment, if the defendant can take advantage of the Statute of Limitations, he must plead that he was not guilty within four years. If an action be brought for detaining plaintiff in prison from ——— to ———, and defendant plead (as he may) as to part, *not guilty within four years*, plaintiff may reply, that it was one continued imprisonment, and so oust the defendant of the benefit of the statute (*e*). Where a

(*a*) *M'Cloughan v. Clayton*, Holt, 478.

(*b*) *Hopkins v. Crowe*, 7 C. & P. 373.

(*c*) *Bayley v. Aldred*, 10 L. T. 523.

For the offences which justify either peace officers or private owners taking persons into custody without warrant,

under particular statutes, see *Archbold's Criminal Pleading*, p. 601, 15th edit.

(*d*) *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(*e*) *Coventry v. Apsley*, Salk. 420. See *ante*, p. 858.

declaration for false imprisonment against A. and B. contained two counts, to both of which the defendants pleaded *Not Guilty*, and justified the first under process, A. as the plaintiff in the original action, and B. as the bailiff; and the plaintiff, by a new assignment, admitting the rest to be lawful, replied that B., with the consent of A., voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not showing the consent of A. : it was held, that he should not be permitted to prove the same trespass against B. under the other count (*f*). Money cannot be paid into court in this action (see 15 & 16 Vict. c. 76, s. 70), except in certain cases by justices.

(*f*) *Atkinson v. Matteson*, 2 T. R. 172.

CHAPTER XXV.

INSURANCE.

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I. *Of Insurance in General.*

INSURANCE is an agreement whereby one party, in consideration of a sum of money, either given or contracted for, undertakes to pay to the other party a certain sum of money upon the happening of some event. A *policy of insurance* is the instrument in which the terms of this agreement are set forth. To this instrument the insurer having subscribed his name, and, in the case of marine insurances, the sum which he undertakes to pay in case the contingency happens, is termed the *insurer* or *underwriter*. The sum of money, received by the insurer as a consideration for his undertaking, is termed the *premium*; and the party protected by the insurance, the *insured* or *assured*. The subject matter of insurance is as various as the different species of property, and the different risks to which they may be exposed. In some cases, however, a contract of insurance may be void, as being against the policy of the common law: in other cases, as being contrary to the express provisions of a statute (*a*). These are the only limits to the subject of insurance. The following sections will be confined to an investigation of three species of insurance only:—1. Marine insurance. 2. Insurance upon lives. 3. Insurance against losses by fire.

II. *Of Marine Insurance.*

The Policy, p. 872.

Different Kinds, p. 873.

Requisites, p. 874.

Rule of Construction, p. 889.

Of Marine Insurance.—Marine insurances are made for the protection of persons having an interest in ships, or goods on board, from the loss or damage which may happen to them during a certain voyage, or a fixed period of time (*b*). Insurance on ships and merchandize greatly conduces to the advancement of trade and

(*a*) See the stat. 9 Ann. c. 6, s. 57, whereby a penalty is imposed on persons setting up offices for making assurances on marriages, births, christenings, and

service. See also stat. 27 Geo. III. c. 1, against fraudulent insurances upon lottery tickets.

(*b*) Marsh. 2.

navigation, and the extension of commerce, by dividing a risk which might be ruinous, and enabling parties to undertake larger adventures than it would otherwise be prudent for them to undertake. The nature of this contract is a contract of indemnity (c), and this principle ought always to be kept in view in considering questions relative to insurance. But although indemnity is the principle of marine and fire insurance, yet this contract is, like other contracts, subject to explanation and construction, regulated in some countries by positive law, in this country by usage; and it will be found, that absolute and perfect indemnity cannot be attained in all cases and under every possible event. One familiar instance may be mentioned: if goods sustain damage on the voyage, but arrive at the place of destination, the freight may become payable, although by reason of the damage the value of the goods may fall short of the amount of freight; but the freight cannot be added to the amount of the damages, and the assured has not a perfect indemnity for his loss (d). And, on the other hand, the assured sometimes receives more than an indemnity for his loss, for the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify (e).

The Policy.—The policy of insurance, which has been defined to be the instrument in which the terms of the agreement are set forth, is generally printed, with a few terms superadded in writing, calculated either to control and confine, or to enlarge and extend, the printed language, and thereby to render it subservient to the intention of the parties in the particular contract. The form of the policy is at this day nearly the same as that anciently used among merchants; every policy still referring to those made in Lombard Street, where the Italians (who introduced them into England) used to meet at a house called the Pawn-house, or Lombard, for transacting business, before the building the Royal Exchange. The instrument is inaccurate and ungrammatical; but having acquired a sense from judicial decision and the usage of trade, it may be safer to adhere to the old form than to substitute another, though more correct. It is a simple contract, by which the heir is not bound, although the word “heirs” is erroneously used in the present form of the policy. The parties are bound by the contents of the instrument, and will not be permitted to give parol evidence contradicting (f) or restraining (g) the express terms thereof.

(c) *Morgan v. Price*, 4 Exch. 615; *Dalby v. The India and London Life Assurance Company*, 15 C. B. 365.

(d) Per Lord Tenterden, delivering judgment, *Winter v. Haldimand*, 2 B. & Ad. 656.

(e) *Irving v. Manning*, 1 H. L. Cas.

307, per Patteson, J.

(f) *Kaines v. Knightly*, Skinn. 54. See also *Henkle v. The Royal Exch. Ass. Comp.*, 1 Ves. 317; *Hoare v. Graham*, 3 Campb. 57; *Meyer v. Everth*, 4 Campb. 22.

(g) *Weston v. Emes*, 1 Taunt. 115.

A mistake in a policy may be altered, *by consent*, after it is underwritten (*h*). In a case where the clerk of the underwriter had been guilty of a mistake, and had not pursued the written instruction of the underwriter, a court of equity decreed relief (*i*). The general rule as to alterations of a policy is, that any material alteration by the assured avoids the policy, except as to those underwriters who have consented by subscribing their names or initials to the alterations. A policy was executed by defendant in the printed form without any specific subject of insurance being inserted in writing, or value declared. The subject-matter was afterwards added in writing, and the addition signed by other underwriters. It was held, that the assured could not recover against defendant, who had not signed, on the contract, as it stood altered by the insertion (*k*). So if the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the policy is thereby destroyed (*l*). But an immaterial alteration will not vitiate the policy (*m*).

Different Kinds of Policies.—Policies are of four different kinds:

1. An interest policy. 2. A wager policy. 3. An open policy. 4. A valued policy:—

1. An *interest* policy is, where the assured has a real, substantial, assignable interest in the thing insured (*n*).

2. A *wager* policy is an insurance founded on an imaginary risk, where the assured has not any interest in the thing insured, and, consequently, cannot sustain any injury by the happening of the event insured against.

3. An *open* policy is, where the value of the thing insured is not inserted in the policy, and must therefore be proved at the trial, if a loss happens.

4. A *valued* policy is where the value of the thing insured has been settled by agreement between the parties, and that value inserted in the policy in the nature of liquidated damages, so as to supersede the necessity of proving it, in case of a total loss. The custom of making valued policies arose soon after the stat. 19 Geo. II. c. 37, and such policies were decided to be legal by *Lee*, C. J.; since which time the constant usage, in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it. That statute was made in order to prohibit mere

(*h*) *Bates v. Grabham*, Salk. 444.

(*i*) *Motteux v. Gov. and Comp. of London Assurance*, 1 Atk. 545.

(*k*) *Langhorn v. Cologan*, 4 Taunt. 330.

(*l*) *Fairlie v. Christie*, 7 Taunt. 416.

See also *Campbell v. Christie*, 2 Stark. 64, to the same effect.

(*m*) *Sanderson v. Symonds*, 1 Brod. & Bingh. 426.

(*n*) *Marshall*, 229.

wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made, *intérêt or no interest*, or without further proof of interest than the policy itself. The effect, therefore, of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the interest of the assured, the parties agree that it shall be estimated at a certain value (*o*). If goods are fraudulently overvalued in a policy of insurance, with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board (*p*).

Requisites of the Policy.—In order to illustrate the nature of the policy, it will be proper to consider the essential parts of which it is composed, which are as follow :—1. The name of the party insured, or of his agent. 2. The name of the ship. 3. The subject-matter of the insurance. 4. The voyage insured. 5. The perils against which the insurer undertakes to indemnify the assured. 6. The memorandum. 7. The date and subscription. 8. The stamp.

1. *The Name of the Party insured, or of his Agent.*

A custom prevailed formerly of effecting marine insurances in blank, that is, without specifying the name of the person for whose benefit such insurances were made. This practice having been found productive of great inconvenience, it was enacted, by stat. 25 Geo. III. c. 44, that where policies were made by persons residing in Great Britain, the names of the persons interested should be inserted therein, or the names of the persons who should effect the same, as agents for the persons interested; and in the case of persons not residing in Great Britain, the names of the agents. Soon after this statute was passed, a question arose upon it, whether, when an agent effected a policy for his principal residing abroad, it was necessary that the name of the agent should be inserted in the policy, *eo nomine*, as agent. It was held that it was necessary (*q*); and also that the names of *all* the persons interested should be inserted (*r*).

The provisions of the preceding statute having been found to be injurious to the interests of the shipowners and merchants, and inadequate to the purpose for which they were designed, the legislature again interposed, and by stat. 28 Geo. III. c.

(*o*) *Per* Lawrence, J., in *Shawe v. Felton*, 2 East, 116; and see *Irving v. Manning*, 1 H. L. Cas. 817.

(*p*) *Haigh v. De la Cour*, 3 Campb.

319.

(*q*) *Pray v. Edie*, 1 T. R. 314.

(*r*) *Wilton v. Reaston*, London Sittings after M. T. 1787; Park, 16.

56, repealed it altogether and enacted, "that no person should effect any policy on any ship, goods, or other property, without first inserting the names, or usual style and firm of dealing (s), of the persons interested in such assurance; or of the consignors or consignees of the property insured; or of the persons residing in Great Britain who receive the order for and effect the policy; or of the persons who give the order to the agent immediately employed to effect the policy; and that every policy made contrary to the meaning of this act should be void." "This statute must receive the most liberal construction the words will bear" (t). It is not necessary under this statute (as it was under the former), that, where an insurance is effected by an agent, the name of the agent should be inserted in the policy, *eo nomine*, as agent. Hence, where a policy was effected by A. and Co. (who were the brokers and general agents of the party interested), and A. and Co. were not described as agents in the policy; but it having been averred in the declaration, that "A. and Co. were the persons residing in Great Britain, who received the order for, and effected the insurance;" it was held sufficient (u). In a case where the policy was effected by insurance brokers, who stated themselves in the policy to have effected it "as agents;" and it was averred in the declaration, that they were the persons residing in Great Britain who received the order for and effected the insurance; but it did not appear that they were in any other instance the agents of the party interested; it was objected, that a mere broker was not within the description of persons mentioned in stat. 28 Geo. III., and that, by the expression "as agents," used in the policy, the underwriter had been deceived, since he might have been led to suppose that the brokers were the general agents of the plaintiff, which they did not appear to have been. But the court overruled the objection, conceiving that the intention of the legislature had been satisfied by inserting the names of the persons immediately employed to effect the policy (x). A., having consigned a cargo to B., transmitted the bills of lading to C., his (*i. e.*, A.'s) general agent, with directions to deliver them to B., in order that B. might insure the cargo; shortly afterwards A. drew a bill of exchange on B. for the amount of the cargo in favour of C., and remitted the same to C. to procure acceptance. B. refused to accept the bill of exchange, and returned the bills of lading to C., who thereupon caused an insurance to be effected on the cargo in his own name, and having informed A. of what he had done, A. approved of it. A loss happened. In an action on the policy, it was averred in the declara-

(s) The persons interested were denominated in the policy "The trustees of Messrs. K. F. & Co." Lord *Ellenborough* thought that this might be considered as their usual style and firm of dealing for the purposes of this act.

Hibbert v. Martin, 1 Campb. 538.

(t) *Per Buller, J.*, 1 B. & P. 322.

(u) *De Vignier v. Swanson*, B. R. M. 39 Geo. III., 1 B. & P. 346, n.

(x) *Bell v. Gilson*, 1 B. & P. 345.

tion, that the interest was in A., and that C. made the insurance as his agent, and for his use and benefit; and that, at the time of making it, C. resided in Great Britain. It was held, that C. fell within the description of persons mentioned in the statute. He might be considered; 1, as the consignee, inasmuch as he was the general agent of A., and had in his possession the bills of lading which had been returned by B., the original consignee; 2, as the person who had received the order to insure; for the subsequent approbation of A. was equivalent to a previous order, and consequently the policy was well effected in the name of C. (y).

2. *The Name of the Ship.*

The name of the ship should be truly described in the policy; for if the underwriter should be deceived, or prejudiced by a false name having been given to him, he will not be bound. To avoid any inconvenience which may arise from a mistake in the name of a ship, it is usual to add in the policy, to the name given, these words, "or by whatever other name or names the said ship should be called;" in which case, although it should appear that the real name of the ship was different from that inserted in the policy, yet, if the identity of the ship can be proved, and if it does not appear that the underwriter will sustain any prejudice, the variance will be immaterial. As where an insurance was made upon a ship called the *Leopard*, "or by whatsoever other name, &c.," whereof was master, for that voyage, A. B., and upon the evidence of A. B. it appeared, that the ship of which he was master was called the *Leonard*; and was never called by the name of the *Leopard*; it was held, by *Lee, C. J.*, that by reason of the general words, "by whatsoever name, &c.," it was only necessary to prove the identity; which was done here by A. B., who said that he was master of the *Leonard* (z). So where a broker had received instructions to insure goods on board an American ship, called the "*President*," but by mistake had stated it in the policy all as one name of a ship, called "the American ship *President*," instead of stating it as part name and part description; it was held, that the general words, or "by whatever other name called," had cured the mistake; the identity of the ship in which the goods were lost, with that in which they were insured for the voyage, being proved, and it not appearing that the underwriter could be prejudiced by the mistake (a). Where there is a policy on goods to be thereafter declared, by ship or ships, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials, he may afterwards, in compliance with the orders

(y) *Wolff v. Horncastle*, 1 B. & P. 316.

in *Le Mesurier v. Vaughan*, 6 East, 385.

(z) *Hall v. Molineux*, coram *Lee, C.*
J., cited and recognized by *Lawrence, J.*,

(a) *Le Mesurier v. Vaughan*, 6 East, 382.

of the assured, declare upon goods by another ship, without the assent of the underwriters, and without a new stamp (*b*).

3. *The Subject-Matter of the Insurance.*

The subject-matter of the insurance ought to be inserted in the policy, that is, whether it be ship, goods, freight, &c.; but it is not necessary that the particular kind of goods should be specified. But the assured should take care that the terms used are large and comprehensive enough to embrace accurately and precisely all the objects of the insurance (*c*). *Respondentia* cannot be insured under the denomination of *goods*, for by the custom of merchants, *respondentia* must be insured under a special denomination (*d*). *Provisions* which are necessary for the use of the ship's crew, and on board at the time of insurance, are comprehended under the word "*furniture*," and are protected by a policy on the ship and furniture (*e*). An insurance had been made on behalf of the captain of an East Indiaman on "goods, specie, and effects," on board his ship: the plaintiff claimed to recover money which he had expended for the use of the ship, and for which he charged *respondentia* interest; it was proved by several East India captains, that this kind of interest was always insured under the denomination of "goods, specie, and effects." The court held, that under this express usage the plaintiff was entitled to recover (*f*). Money advanced to the assured as owner of the ship, on account of freight of the cargo loaded on board her, and subject to the risk of the voyage, may be insured as *freight*. "Great latitude," said *Campbell*, C. J., in delivering the judgment of the court, "is allowed in describing the interest in a policy of insurance provided that the nature of it is intelligibly disclosed; and there seems no reason why the money advanced may not be insured as freight as well as the money to grow due on the charter, which is undoubtedly insurable as freight, although not properly freight, and rather the price of the hire of the ship" (*g*).

4. *The Voyage Insured.*

The voyage insured must be truly and accurately described in the policy, namely, the time when, and place at which, the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end (*h*). A ship was insured "at and from Genoa," her loading consisting of perishable com-

(*b*) *Robinson v. Touray*, 3 Campb. 158; 1 M. & S. 217.

(*c*) See *Winter v. Haldimand*, 2 B. & Ad. 649.

(*d*) *Glover v. Black*, 3 Burr. 1394; 1 Bl. R. 405, recognized in *Simonds and Loder v. Hodgson*, 6 Bingh. 114.

(*e*) *Brough v. Whitmore*, 4 T. R. 206.

(*f*) In *Gregory v. Christie*, Park, 11; Marshall, 82; 3 Doug. 419.

(*g*) *Hall v. Janson*, 4 E. & B. 500; 24 L. J., Q. B. 96.

(*h*) Marshall, 227; *Smith v. Yelton*, D. P. 21 July, 1806.

modities. The loading was put on board at Leghorn; whence the vessel had sailed, bound for Dublin; but losing her convoy she had put into Genoa, where she lay nearly five months, and then sailed. The insurance was made a few days after the ship had sailed from Genoa, at which time the above-mentioned circumstances were known to the assured, but not communicated to the underwriter. A few days after the ship put to sea she was shattered by a storm, and the cargo considerably damaged. In an action on the policy, it was proved that it had been always considered as material to acquaint the underwriter, whether the insurance was to be at the commencement or in the middle of a voyage: it was held, that the plaintiff was not entitled to recover (*i*). In an action upon a policy of insurance, at, and from *all, any, or every port and place on the coast of Brazil, and after the 17th day of September to the Cape of Good Hope, upon goods and ship*, beginning the adventure upon the goods from the loading thereof aboard the ship, at *all, any, or every port and place on the coast of Brazil, and from the 17th day of September, 1800, and upon the ship in the same manner*; it appeared that the goods, for the loss of which the plaintiff declared, had been put on board at the Cape. It was held, that the plaintiff could not recover; for the obvious meaning of the policy was, that the adventure was to attach on goods and ship, after a loading of goods had taken place on the coast of Brazil; and as that circumstance or event never took place in the present instance, the policy of course never attached at all (*k*). A policy at and from G., on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at G. (*l*). The foregoing cases have been considered as laying down a rule of strict construction not to be favoured: hence, if there be anything to indicate that a prior loading was contemplated, it will release the case from that strict construction; as where the policy was on goods at and from G., to any port in the Baltic, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy, which was a policy from V. to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods, wheresoever to return twelve per cent. if the voyage ended at G.; it was held, that the assured were entitled to recover, although the goods were not loaded on board at G., but at V., and although the defendant was not an underwriter on the former policy (*m*). So where the policy was on goods at and from Per-

(*i*) *Hodgson v. Richardson*, 1 Bl. Rep. 463.

(*k*) *Robertson v. French*, 4 East, 130. See *Spitta v. Woodman*, 2 Taunt. 416; *Horney v. Lushington*, 15 East, 46.

(*l*) *Langhorn v. Hardy*, 4 Taunt. 628.

See *Spitta v. Woodman*, 2 Taunt. 416, *S. P.*

(*m*) *Bell v. Hobson*, 16 East, 240; 3 Campb. 272. See also *Rickman v. Carstairs*, 5 B. & Ad. 651.

nambuco to Maranham, and thence to Liverpool, beginning the adventure on the goods from the loading thereof, on board the ship, *wheresoever*; it was held, that it would cover goods previously loaded at Liverpool, and which arrived at P., but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from P. to M. (*n*).

On a homeward policy of insurance on ship "at and from" a port, the risk attaches on the first arrival within the natural boundaries of the port when once in safety, although the ship may not have been moored at the point of discharge, or the outward and homeward policies may overlap (*o*).

If a ship be insured for a certain voyage, from port to port, and the assured abandons his intention of proceeding to the original port of destination, and intends to reach another, the policy is discharged, although the ship be taken before she arrives at the dividing point of the two voyages (*p*). So if a ship, insured from a certain time, sail *before* the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day on which the policy was to have attached (*q*). So if the ship deviates from the usual course of the voyage, although the port of destination is still intended to be reached, the policy is avoided. It is enough that the risk insured against is altered; it need not have been increased (*r*). But if the termini of the intended voyage are the same with that described in the policy, a mere intention to touch at a particular port out of the usual track of the voyage insured, will be considered as an INTENTION *only to deviate*, and as such will not vacate the policy. The voyage is to be considered as the same, until the vessel arrives at the dividing point of the two voyages (*s*).

Goods were insured on board a vessel on a voyage from Liverpool to Palermo, Messina and Naples. She cleared out for Naples only, and was captured before the dividing point; it was held, that there was an inception of the voyage insured; that the voyage insured meant a voyage to all or any of the places, with this reserve only, that if the ship went to more than one place, she must visit them in the order described in the policy (*t*). Goods were insured on board a ship from London to Nantz, with liberty to call at Ostend, and she was cleared only for Ostend, but sailed directly for Nantz, that being the known course of the trade, in order to save certain duties both in England and France; it was held, that

(*n*) *Gladstone v. Clay*, 1 M. & S. 418.

(*o*) *Haughton v. The Empire Marine Assurance*, 1 L. R., Ex. 206; 35 L. J., Ex. 117.

(*p*) *Wooldridge v. Boydell*, 1 Doug. 16.

(*q*) *Way v. Modigliani*, 2 T. R. 30.

(*r*) *Hartley v. Buggin*, 3 Dougl. 39,

per Lord Mansfield.

(*s*) *Kewley v. Ryan*, 2 H. Bl. 343, cited by *Bayley, J.*, in *Hare v. Travis*, 7 B. & C. 18.

(*t*) *Marsden v. Reid*, 3 East, 572. See *Ashley v. Pratt*, 16 M. & W. 471; (*in error*) 1 Exch. 257; 17 L. J., Exch. 135.

there was not any fraud on the underwriter so as to vacate the policy (*u*). A ship insured from A. to B. sailed with directions to the captain to touch at C., an intermediate point. To a certain point the voyage was the same; from that point there were three tracks to B., one by the way of C., the two others by different courses; there were advantages and disadvantages attending each, and it was usual for the captain to elect, according to circumstances; the ship took the track by C., with intent to put in there, but was taken before she actually came to the point, where she must have turned out of the track to B. by the way of C., for the purpose of putting into the harbour of C.; it was held, that the underwriter was discharged; because he was entitled to the advantage of the captain's judgment in electing which of the three tracks it was best to pursue, when he came to the first dividing point (*x*). A liberty "to cruise six weeks" in a policy of insurance, has been held to mean six weeks successively, from the commencement of the cruise (*y*). A policy of insurance was effected on a ship for a certain voyage *with letters of marque, with leave to chase, capture and man prizes*; it was held, that acting as a convoy to a prize, which the ship insured had taken, and slackening sail in the course of the voyage insured, in order to make the sailing of the ship insured conform to that of the prize, was not within the meaning of the terms *chasing, capturing and manning prizes* (*z*). See further on this subject (*a*). Policy on a ship for four months, at and from a place to any port or ports; it was held, that an open roadstead (being the usual place of loading and unloading) was a port within the meaning of this policy (*b*). So a place lying within a bay, with a roadstead and custom-house, and of which the British consul describes himself as vice-consul, has been held to be a port within the meaning of the policy (*c*). Going from one place to another seven miles off in order to complete the loading of a cargo, is a deviation from a voyage described as "at and from a port of loading;" the places being considered two distinct ports or places although they lie within the same bay, and are subject to the jurisdiction of the same custom-house (*d*).

5. *The Perils against which the Insurer undertakes to indemnify the Assured.*

These perils must be inserted in the policy. Molloy, in his Treatise, "De Jure Maritimo," says, that there is scarce any misfortune which is not provided against by the terms of the policy

(*u*) *Planché and another v. Fletcher*, 1 Doug. 250.

(*x*) *Middlewood v. Blakes*, 7 T. R. 162.

(*y*) *Syers v. Bridge*, Doug. 527.

(*z*) *Lawrence v. Sydebotham*, 6 East, 45. See *Hibbert v. Haliday*, 2 Taunt. 428.

(*a*) *Parr v. Anderson*, 6 East, 202.

(*b*) *Cockey v. Atkinson*, 2 B. & A. 460.

(*c*) *Scotland Sea Insurance Company v. Gavin*, 4 Bli. 578; 2 Dow. & C. 129.

(*d*) *Brown v. Tayleur*, 5 Nev. & M. 472; 4 A. & E. 241.

which was used in his time, and there is in the modern printed form of policy an enumeration of the same adventures and perils, that is, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, taking at sea, arrests." And the underwriter is liable for a loss, the proximate cause of which is one of the enumerated risks, although the remote cause may be traced to the negligence of the master and the mariners (*e*). In all our policies are inserted the words, "lost or not lost," by which the insurer not only takes upon himself the risk of future loss, but also the loss, if any, that may already have happened (*f*); and it is no answer to an action on such a policy, that the interest in the goods was not acquired until after (*g*) an average loss by sea damage. If, however, the goods were totally lost before the contract of purchase was made, there would not be an insurable interest (*h*). Where a valued time policy is effected *bonâ fide* on a ship in a distant part of the world, and, unknown to the owner, the ship is valueless at the time that the policy attaches, the underwriter is bound by the valuation in the policy. Fraud alone can vitiate it (*i*).

6. Of the Memorandum.

The underwriters of London, in order to protect themselves against small averages, which might be claimed in respect of perishable commodities, have inserted, at the foot of the policy, a memorandum to the following effect: "N. B. Corn (*k*), fish, salt (*l*), fruit, flour, and seed, are warranted free from average, unless general, *or the ship be stranded*; sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, are warranted free of average under 3*l.* per cent., unless general, *or the ship be stranded*." The words in italics have been omitted for several years in the forms of policies adopted by the two insurance companies, *viz.*, London Assurance, and Royal Exchange Assurance. By virtue of this memorandum, the insurer is not bound to make good any average or partial loss upon the articles specified in the memorandum except a general average, or unless the ship be stranded.

The term *general average* requires explanation. Whatever

(*e*) *Busk v. R. E. A. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Al. 171; *Bishop v. Pentland*, 7 B. & C. 223; *Blyth v. Shepherd*, 9 M. & W. 765; *Redman v. Wilson*, 14 M. & W. 476.

(*f*) *Mead v. Davison*, 3 A. & E. 303; 4 Nev. & M. 701.

(*g*) *Sutherland v. Pratt*, 11 M. & W. 296.

(*h*) *Hastie v. Couturier (in error)*, 9 Exch. 109; *S. C.* 22 L. J., Exch. 302.

(*i*) *Barker v. Janson*, L. R. 3 C. P. 303.

(*k*) The word *corn* comprehends peas; *Mason v. Skurray*, Marsh. 169; *Park*, 253; and malt; *Moody v. Surridge*, 2 Esp. N. P. C. 633, *Kenyon*, C. J.; but not rice; *Scott v. Bourdillon*, 2 N. R. 213.

(*l*) The word *salt* does not comprehend saltpetre; *Park*, 243, *per Wilson*, J.

damage or loss is incurred by any particular part of the ship or cargo *for the preservation of the rest*, such damage or loss shall be considered as *general average*; that is, the several parties interested in the ship, freight (*m*), or cargo, shall contribute their respective proportions to indemnify the owner of the particular part for the damage, which has been incurred *for the good of all*. From the preceding description it appears, that in order to constitute a general average, the whole adventure must have been in jeopardy. A ship laden with coals and wheat (which were the subject-matter of insurance) was forced, by stress of weather, into a harbour in Ireland, and there happening to be a great scarcity of corn there at that time, the people came on board in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded, and they would not leave her till they had compelled the captain to sell all the corn except about ten tons, at a certain rate which was about three-fourths of the invoice price. The ten tons were damaged in consequence of the stranding, and it became necessary that they should be thrown overboard. The ship afterwards arrived at her place of destination with the remainder of her cargo, which was about 25*l.* worth of coals. It was contended, that the loss sustained was a general, and not a particular, average; but the court were of a different opinion, Lord *Kenyon*, C. J., observing, that this was not a general average, because the whole adventure was never in jeopardy. There was not any pretence to say that the persons who took the corn intended any injury to the ship, or to any other part of the cargo, except the corn, which they wanted in order to prevent their suffering in a time of scarcity: therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion as upon a general average (*n*). A custom that underwriters are not liable under the ordinary form of policy for general average in respect of the jettison of goods stowed on deck is a valid custom, and does not contradict the terms of the policy (*o*).

If a ship is submerged with cargo on board, so that it cannot be got out without raising the ship, the cost of raising is general average (*p*).

It is not every object of value which has been held liable to a contribution for average, but such stores only as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce. Hence

(*m*) *Da Costa v. Newnham*, 2 T. R. 407; *Williams v. London Assurance*, 1 M. & S. 318.

(*n*) *Nesbitt and another v. Lushington*, 4 T. R. 783.

(*o*) *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex: 217.

(*p*) *Kemp v. Halliday*, L. R. 1, Q. B. 520, in error; 35 L. J., Q. B. 156. For principles upon which goods jettisoned are to be valued for the purposes of contribution, see *Fletcher v. Alexander*, L. R. 3, C. P. 375; 37 L. J., C. P. 193.

it has been held, that provisions do not contribute to general average, even where the cargo consisted of passengers only, in a convict ship (*q*).

Insurance at and from C. to L. on goods, in a ship by name, until the same should be there safely discharged and landed, *rice free of particular average*, and the ship with rice and other goods arrived within the limits of the port of L., but before she could be brought to her moorings or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at L. and sold, and produced upon the whole little more than sufficient to pay freight and salvage, but the rice did not produce sufficient to pay the freight: it was held, that this was a case of particular average only, and therefore as to the rice the underwriter was exempted by the warranty (*r*). "Particular average" does not include expenses, usually called "particular expenses," which are necessarily incurred in order to save the subject matter of insurance from a loss for which the insurers would have been liable; the insurers are liable to such expenses under the usual suing and labouring clause: "that in case of any loss or misfortune it shall be lawful to sue, labour and travail for in and about the defence, safeguard and recovery of the aforesaid subject matter, without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured" (*s*).

But where there is a policy against total loss only, the expenses incurred for the purpose of forwarding the subject of insurance to its destination, at a time when it is not in any peril of total loss, either actual or constructive, are not recoverable. Such extra freight is particular average (*t*).

Upon the other branch of the exception, *viz.* the words "unless the ship be stranded," it has been held, that these are words of condition, and that if such condition happens, it destroys the exception and lets in the general words of the policy, and that the underwriter is liable for an average loss upon the articles specified in the memorandum, where there is a stranding, although no part of the loss happen in consequence of the stranding, provided such average loss arises from one of the perils insured against (*u*). "When a ship is stranded, the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though the fact cannot always be ascertained" (*v*).

(*q*) *Brown v. Stapyleton*, 4 Bingh. 119. See Phillips on Insurance, vol. 2, pp. 152—4. (3rd edit.)

(*r*) *Glennie v. The London Ass. Comp.*, 2 M. & S. 371.

(*s*) *Kidston v. The Empire Marine Insurance Co.*, L. R. 1, C. P. 535; 35 L. J., C. P. 250.

(*t*) *Great Indian Peninsular Railway*

Co. v. Saunders, 2 B. & S. 266, in error; 31 L. J., Q. B. 206.

(*u*) *Burnett v. Kensington*, 7 T. R. 210, recognized by *Tindal*, C. J., delivering judgment of court in *Kingsford v. Marshall*, 8 Bingh. 463.

(*v*) *Per Lord Kenyon*, C. J., *Nesbitt v. Lushington*, 4 T. R. 787.

To constitute a stranding, it is essential that the vessel should be stationary; the striking on a rock where the vessel remains for a minute-and-a-half only, is not a stranding, though she thereby receives an injury which eventually proves fatal (*x*). A stranding (*y*) may be said to take place where a ship takes the ground not in the ordinary course of the navigation, but by reason of some unforeseen accident, for the mere taking of the ground in the ordinary course of the voyage, is not a stranding within the meaning of the policy (*z*). Upon the ebbing of the tide, a vessel took the ground in a tide-harbour in the place where it was intended she should; but in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged; this was held not to be a stranding (*a*).

Where a ship being under conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock-basin, by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged; it was held, that this was a stranding to entitle the assured to recover for an average loss upon the goods (*b*). So where, in assumption on a policy on goods warranted free from average, unless the ship were stranded, it appeared, that in the course of the voyage, the ship was, by tempestuous weather, forced to take shelter in a harbour, and in entering, she struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground, and remained fast there for half an hour; it was held, that this was a stranding within the meaning of the policy (*c*). Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water: and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: it was held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage (*d*). So where a ship having goods on board, was compelled, in the course of her voyage, to put into a tide-harbour, and was there moored alongside a quay, in the usual place for ships of her burthen. It became necessary,

(*x*) *Macdougale v. The Royal Exch. Ass. Co.*, 1 Stark. N. P. C. 130.

(*y*) *Per Bayley, J.*, in *Bishop v. Pentland*, 7 B. & C. 224. The case of *Bishop v. Pentland* was recognized in *Wells v. Hopwood*, 3 B. & Ad. 20, *Parke, J.*, *dissentiente*.

(*z*) *Hearne v. Edmunds*, 1 B. & B. 388.

(*a*) *Kingsford v. Marshall*, 8 Bingh. 458.

(*b*) *Carruthers v. Sydebotham*, 4 M. & S. 77.

(*c*) *Barrow v. Bell*, 4 B. & C. 736.

(*d*) *Rayner v. Godmond*, 5 B. & A. 225.

in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over, upon the tide leaving her. The rope, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured: it was held, that this was a stranding (*e*). So where the ship, having arrived in Hull harbour, was in the course of discharging her cargo at a quay alongside of which she was moored. At low water she grounded on the mud; but on one occasion, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from a particular quarter, instead of grounding entirely on the mud, as it was intended she should have done, she partly grounded on a bank of rubbish and stones. This grounding was held, by a majority of the judges, to be a stranding (*f*). It will be remarked, that all these cases were decided upon the principle, that the taking the ground was occasioned by some extraneous and accidental cause: and was not a taking of the ground in the usual course of navigation. According to Lord *Tenterden*, the rule which may fairly be collected from the greater number of the cases is this:—"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour, upon the ebbing of the tide or from a natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the meaning of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered as a stranding" (*g*). And *Tindal*, C. J. (*h*), said, that it is a stranding "where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause" (*i*). Where goods were insured free from average, unless general, or the ship be stranded, and a particular average loss was incurred by the stranding of a *lighter* conveying the goods from ship to shore; it was held, that the insurer was not liable (*k*).

Where there is neither general average nor stranding, it seems that the underwriter is not liable at all, if the commodity specifically remain, although the damage sustained may amount to a total loss (*l*). The Royal Exchange Assurance Company was held

(*e*) *Bishop v. Penland*, 7 B. & C. 219.

(*f*) *Wells v. Hopwood*, 3 B. & Ad. 20.

(*g*) In *Wells v. Hopwood*, 3 B. & Ad. 34.

(*h*) *Kingsford v. Marshall*, 8 Bing. 463.

(*i*) 8 Bingh. 458; and see for an application of these principles the recent cases of *Corcoran v. Gurney*, 1 E. & B.

456; 22 L. J., Q. B. 113; and *Buttner v. Magnus*, 11 C. B. 876; 21 L. J., C. P. 119.

(*k*) *Hoffman v. Marshall*, 2 Bingh. N. C. 383; 2 Scott, 559; see *post*, p. 897.

(*l*) *Mason v. Skurray*, London Sittings after H. T. 1780, *coram* Lord *Mansfield*, C. J., Park, 191, 192; *Cocking v. Fraser*, Marsh. 144.

to be liable for a total loss upon a cargo of wheat, where the ship, from the perils insured against, become incapable of pursuing the voyage, and another vessel could not be procured to forward the cargo (*m*).

7. *The Date.*

Regularly the policy should be dated (*n*), that is, to each subscription, for each subscription makes a distinct contract, the day on which, and the month and year in which, it is made ought to be added. The insertion of a date may tend to the discovery of fraud, and consequently ought not to be omitted. It is usual, although not essentially necessary, to specify the sum insured: and the mode of doing this is by writing the sum in words, and not in figures, in order to prevent any alteration being made.

8. *The Stamp.*

The policy must be duly stamped (*o*) at the time when it is effected, for it cannot be legally stamped afterwards (*p*).

A policy of insurance was subscribed by the defendant on the 5th of February, 1800, and duly stamped, purporting to be a policy "on goods and specie on board of ship or ships sailing between the 1st of October, 1799, and the 1st of June, 1800, being the property *which should first sail* to a certain amount, and upon the vessels carrying the goods." After the 1st of June, 1800, but before any notice of the determination of the risk (*q*) had been received, a memorandum was written on the policy, and subscribed by the defendant, whereby it was agreed to extend the time of sailing to the 1st of August, 1800. It was held, that although by this memorandum the time of sailing was extended, yet the object of the insurance continued the same; and consequently the memorandum, falling within the proviso contained in the 13th section of the stat. 35 Geo. III. c. 63, did not require a stamp (*r*).

The stat. 35 Geo. III. c. 63, s. 13, provides, "that the act shall not extend to prohibit the making any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so

(*m*) *Per Lord Ellenborough, C. J., Wilson v. Royal Exch. Ass. Comp.*, 2 Camp. 623. See also *Manning v. Newnham*, 2 Camp. 624, n.: 3 Doug. 130; and *Anderson v. Wallis*, 2 M. & S. 240.

(*n*) *Marsh. 270.*

(*o*) For the amount of the stamp duties, see stat. 30 & 31 Vict. c. 23.

(*p*) *Roderick v. Hovil*, 3 Campb. 103. A policy of mutual assurance that has been previously stamped, if not underwritten beyond amount warranted by

previous stamp, may be stamped after being again underwritten, 9 Geo. 4, c. 49, s. 1; 5 & 6 Vict. c. 82, s. 26.

(*q*) "Determination of the risk," is to be understood either the loss or safe arrival of the thing insured, or the final end and conclusion of the voyage. *Per Lord Ellenborough, C. J., delivering judgment of court in Kensington v. Inglis*, 8 East, 291.

(*r*) *Kensington v. Inglis (in error)*, 8 East, 273.

that such alteration be made before notice of the determination of the risk originally insured, &c., and so that the thing insured shall remain the property of the same persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by means of such alteration." The words "the thing insured shall remain the property, &c.," apply to one identical and continued subject-matter *all along remaining* the property of the same proprietor, and will not comprehend a case where the thing last insured is not only in fact, but in name and kind, as a specific object of insurance, essentially different from the thing first insured, and which begins also to have an existence at a much later period than the other, and when the thing first insured scarcely, or in a small degree only, *remains* or continues to exist at all. Hence, where the original policy was "on ship *and outfit*," at and from London to the South Seas, during the ship's stay and fishing there, and at and thence to Great Britain, &c.; and after the ship had sailed on the voyage insured, by consent of the underwriters, the policy was altered, and declared to be on the ship and *goods*, instead of the ship and *outfit*: it was held, that as the outfit for such a voyage as was described in the policy differed materially from what was comprehended under the term *goods*, the policy in its altered state required an additional stamp within the meaning of the preceding section (s). It was held afterwards, that the assured could not recover upon the policy in its original state, as an assurance on "ship and outfit," by reason of the alteration apparent on the face of the instrument, such alteration having been made by the parties interested (t).

But where a broker, instructed to effect a policy on goods, effected it on ship, and the mistake was afterwards rectified by the underwriter subscribing a memorandum in the margin: it was held, that a new stamp was not necessary (u). So where a mistake was made by an agent in declaring the interest in the margin of the policy to be on a ship by a wrong name; it was held, that it might be rectified by inserting the true name without a fresh stamp (x). A policy was effected at four guineas per cent. on hemp marked R. and valued, with certain returns of premium, upon arrival at certain ports, and warranted to sail before the 20th of August, which was a summer risk and premium. By a memorandum indorsed, the underwriter, for four guineas additional and the return of five shillings less for arrival, absolved the assured from the warranty of sailing before the 20th of August, so making it a winter risk, and withdrew the mark of the hemp; it was held, that these alterations might be made by stat. 35 Geo. III. c. 63,

(s) *Hill v. Patten*, 8 East, 373, cited & C. 264.
in *Bathe v. Taylor*, 15 East, 415.

(t) *French v. Patten*, 9 East, 351; 1
Campb. 72, cited in *Reed v. Deere*, 7 B.

(u) *Sawtell v. Loudon*, 5 Taunt. 359.
(x) *Robinson v. Touray*, 1 M. & S.
217.

s. 13, without any new stamp (*y*). Policy on goods at and from Stockholm to Swinemunde. The ship being driven into Wisby on the 20th May, and detained there till the 9th October, the assured, on 1st July, wrote to their agents in London, "that the captain had been ordered to proceed to Königsberg, as they were not certain whether the enemy might be at Swinemunde or not, and that the passage to Königsberg was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters." The agents having received this letter on the 12th July, applied to the underwriters for their consent to alter the policy, by adding the words "Königsberg or Memel" after "Swinemunde," which consent was obtained. The ship and goods were afterwards lost on their voyage to Königsberg; it was held, that this alteration did not require a new stamp (*z*). So where the policy was, "at and from Liverpool to Quebec," and afterwards, by a memorandum at the foot, it was changed to "from Liverpool to St. John's, New Brunswick;" it was held, that a new stamp was not necessary (*a*). Policy of insurance on ship and goods at and from Cuba to Liverpool, with liberty, "in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," to which interpolation all the underwriters assented, without increase of premium, except the defendant, who, being out of the way, was not applied to. The captain sailed from Cuba with eight men, engaged to navigate to Liverpool, and two to Jamaica, being unable, at Cuba, to procure ten men (the proper complement of the crew), for Liverpool. She then touched at Jamaica, for the sole purpose of landing the two men, and procuring others in their stead; and, having accomplished this purpose, was lost on the voyage from Jamaica to Liverpool: it was held, 1st, that this was a material alteration of the policy, and rendered it void; 2nd, that the ship was not, as to the crew, seaworthy for the whole voyage (as she ought to have been), when she sailed from Cuba; 3rd, that the circumstance of her having become seaworthy after her leaving Cuba, and before the loss, did not entitle the plaintiff to recover (*b*).

A policy on a ship, lost or not lost, is good, the ship having been accepted for insurance and the premium paid before loss, although the policy was not actually executed and stamped till loss had happened, and both insurer and assured knew it. (*c*)

(*y*) *Hubbard v. Jackson*, 4 Taunt. 81.
169.

(*z*) *Ramstrom and another v. Bell*, 5 M. & S. 267.

(*a*) *Brockelbank v. Sugrue*, 1 B. & Ad.

(*b*) *Forshaw v. Chabert*, 2 B. & B. 158.

(*c*) *Mead v. Davison*, 3 A. & E. 303; 4 Nev. & M. 701.

9. *Of the Construction of Marine Policies.*

"The same rule of construction which applies to all other instruments, applies, equally to a policy of assurance, *viz.*, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effect the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired, from use and practice, a known and definite meaning, and that the words super-added in writing, subject indeed always to be governed in point of construction by the language and terms with which they are accompanied, are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words; inasmuch as the written words are the immediate language and terms selected by the parties for the expression of their meaning, and the printed words are a general formula, adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects" (*d*). And Lord *Campbell* thus lays down the law as to the admissibility of evidence of usage:—"Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade, and a usage consistent with a written contract may be introduced into it, as both parties being aware of it, may be supposed to intend that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract, would be contrary to all principle, and has been forbidden as often as the attempt has been made" (*e*).

(*d*) Lord *Ellenborough*, C. J., delivering judgment of court in *Robertson v. French*, 4 East, 135, recognized by Lord *Tenterden*, C. J., delivering judgment of court in *Hunter v. Leathley*, 10 B. & C.

871.

(*e*) *Hall v. Janson*, 4 E. & B. 504; 24 L. J., Q. B. 101. See *Booth v. Gain*, 15 C. B. (N. S.) 291; 33 L. J., C. P. 99.

III. *What Persons may be Insured.**Who may be Insurers*, p. 890.*What may be Insured*, p. 891.*What Persons may be Insured.*

In this country all persons, whether British subjects or aliens, may, in general, be insured. But an action cannot be maintained on a policy at the suit or on the behalf of an alien enemy during war, although the property insured be of British manufacture, and exported from this country (*f*).

Where a ship belonging to an alien enemy is protected by the king's licence, an insurance may be effected on such ship by a British subject, as trustee on the behalf of the shipowner, and an action on the policy may be maintained at the suit of the trustee even in time of war, because the public policy of the country is not contravened by sustaining and giving effect to such trust; and although the king's licence cannot, in point of law, have the effect of removing the personal disability of the shipowner (being an alien enemy) in respect of suit, so as to enable him to sue in his own name, yet it purges the trust in respect to him of all the injurious qualities in regard to the public interest (*g*).

An English subject who lives and carries on trade under the protection and for the benefit of a hostile state, and who is so far a merchant settled in the state that his goods would be liable to confiscation in a court of prize, is not to be considered as entitled to sue as an English subject in an English court of justice. Residing under the allegiance and protection of a hostile state, he may be considered, to all civil purposes, as much an alien enemy as if he were born there. But if he reside in a neutral country, he is entitled to all the privileges of a neutral country (*h*).

Who may be Insurers.

At the common law, any person in his individual and separate capacity, or any number of persons forming a society or partnership, might have been insurers; but the stat. 6 Geo. I. c. 18, authorized the king to grant charters to two distinct companies for assurance of ships, goods, and merchandizes at sea, or going to sea, and for lending money on bottomry, and in pursuance of the powers given by this statute, the Royal Exchange Assurance and the London Assurance Companies were established by charters, bearing date the 22nd day of June, 1720: and by the 12th section of the before-mentioned statute, it was enacted, that "all corporations societies, and partnerships (other than the two corporations) should

(*f*) *Brandon v. Nesbitt*, 6 T. R. 23;
Bristow v. Towers, 6 T. R. 35. See also
Flindt v. Waters, 15 East, 260.

(*g*) *Kensington v. Inglis*, 8 East, 273,
 recognized in *Flindt v. Waters*, 15 East,

266.

(*h*) See *M'Connell v. Hector*, 3 B. &
 P. 113, and *Willison v. Patteson*, 7
 Taunt. 449.

be restrained from underwriting." By stat. 5 Geo. IV. c. 114, s. 1, this restraint was removed, and now any corporation or body politic, society, or partnership, or persons acting in any society or partnership, may grant, sign, and underwrite any policy of assurance, upon any ship or goods, at sea or going to sea, or lend money by way of bottomry. But by the 2nd section it is provided, that this act shall not affect the rights and privileges of the corporations of the Royal Exchange and London Assurance, otherwise than by making it lawful for other corporations and bodies politic, and persons acting in societies or partnership, to grant and make such policies of assurance and contracts of bottomry. It may be remarked, that the object of the 12th section of the statute of George I. was merely to avoid *marine* insurances entered into by corporations and partnerships, other than the two privileged corporations: for it was expressly declared, at the close of that section, that any private persons might underwrite as fully and beneficially as before that statute, provided they did not underwrite upon the account or risk of a corporation, or persons acting in partnership.

What may be Insured.

The subjects of marine insurance are, ships, goods, merchandize, freight (*i*), bottomry, and respondentia interest; a special interest in goods, as the lien of a factor (*k*), money expended by the captain for the use of an East India ship (*l*); the captain's commission and privileges in an African trade ship (*m*); the profits expected to arise from a cargo, as from a cargo of molasses (*n*), or from a cargo employed in the trade on the coast of Africa (*o*). The policy of the law considers the insurance of seamen's wages, or of anything to be received at the end of the voyage in lieu of wages, as illegal (*p*). The law of England, following the marine law, did not allow the mariners any wages, unless the ship earned freight. This law would have been completely evaded, if the mariners could have insured their wages. But now by 17 & 18 Vict. c. 104, s. 183, wages are no longer dependent on the earning of freight, but whether this has made any alteration as to the non-insurability of a seaman's wages, has not, it is believed, been decided. There never was, and is not any such rule as to the captain, but an insurance on money lent to the captain, payable out of the freight, is illegal (*q*). But a mere expectation without any interest is not insurable; as where a vessel not having strictly complied with the provisions of a

(*i*) *Montgomery v. Eggington*, 3 T. R. 362.

(*k*) *Park*, 9; *Godin v. London Assurance Company*, 3 Burr. 1401.

(*l*) *Gregory v. Christie*, *Park*, 14; 3 Doug. 419.

(*m*) *King v. Glover*, 2 N. R. 206.

(*n*) *Grant v. Parkinson*, 3 Doug. 16; *Eyre v. Glover*, 3 Campb. 276.

(*o*) *Barclay v. Cousins*, 2 East, 544.

See also *Hodgson v. Glover*, 6 East, 316; *M'Swinney v. Royal Exch. Ass. Comp.*, 14 Q. B. 634; *S. C. (in error) ibid.* 646; *Halhead v. Young*, 6 E. & B. 312; 25 L. J., Q. B. 290.

(*p*) See *Webster v. De Tastet*, 7 T. R. 157; *Stainbank v. Shepard*, 13 C. B. 418.

(*q*) *Wilson v. Royal Exch. Ass. Comp.*, 2 Campb. 626.

French law by which a bounty is given to ships fishing in certain latitudes under certain conditions, and therefore not being entitled to the bounty as a matter of right; it was held, that although it was the practice of the French government to allow the bounty to vessels under similar circumstances, without inquiry as to the strict performance of the conditions, such an expectation of the bounty was not an insurable interest (*r*).

With respect to an insurance on freight, it is to be observed; 1st, that freight ought to be insured *eo nomine* as freight, and that it will not be covered by an insurance on goods; and 2ndly, unless an inchoate right to the freight has commenced, the assured will not be entitled to recover (*s*). The risk does not attach until the goods are either actually shipped on board, or until there is an actual contract for shipping them (*t*). In an action upon a policy of insurance upon ship and freight (*u*), it appeared that the ship had been destroyed by a tempest, before the goods, which were ready to be shipped, were actually on board. *Lee, C. J.*, was of opinion, that the plaintiff was not entitled to recover for freight, as the goods not having been actually on board, the plaintiff's right to freight had not commenced. But where the right to freight has commenced, as if part of the goods are on board, and the rest ready to be shipped, the plaintiff will be entitled to recover on an insurance on freight (*x*). So where plaintiff, a shipowner, effected a policy on freight at and from the Coromandel coast to Bourbon: the ship put into port on the Coromandel coast for repairs; the plaintiff purchased a cargo, and had it ready to be sent on board in storehouses about seven miles from the port. The ship was lost by an accident in getting out of dock. It was held, that the cargo being ready when the ship was about to leave the dock, the risk attached (*y*). So, where a ship was chartered for a voyage from London to Teneriffe, where she was to take wine on board, and to carry it to the West Indies, and it was covenanted that the owner was to receive for the freight for the said voyage so much per pipe, and the vessel set sail, but was captured before she arrived at Teneriffe; it was held, that, as in this case the inchoate right to freight commenced from the inception of the voyage, that is, the instant the ship sailed from London, the plaintiff was entitled to recover on a policy on freight. *Note.* In this case the policy was a valued policy on freight "at and from London to Teneriffe, and at and from thence to the West Indies" (*z*). So where an insurance was made by shipowners on freight of a certain ship "at and from Dominica," &c. to London, and it appeared that the ship had

(*r*) *Devaux v. Steele*, 6 B. N. C. 358.
See also *Stockdale v. Dunlop*, 6 M. & W. 224.

(*s*) *Baillie v. Moudigliani*, Park, 90.

(*t*) *Flint v. Flemyng*, 1 B. & Ad. 45.

(*u*) *Tonge v. Watts*, Str. 1251.

(*x*) *Montgomery v. Eggington*, 3 T. R. 362.

(*y*) *Devaux v. J'Anson*, 5 B. N. C. 519.

(*z*) *Thompson v. Taylor*, 6 T. R. 478.

been chartered for a voyage *from London to Dominica, and back to London*, the charterers agreeing to pay a certain part of the freight which the ship should make outwards, and also to procure for the ship at Dominica a full cargo at the current freight for London: the ship having arrived at Dominica, and delivered her outward-bound cargo, was captured while she lay at Dominica, before any part of the home-bound cargo, which was ready to be loaded, could be put on board. An endeavour was made to distinguish this case from the preceding case of *Thompson v. Taylor*, on the ground, that there the insurance was on a valued policy upon freight on a chartered ship *at and from London to Teneriffe*, and at and from thence to the West Indies; and which, as it was said, turned on the entirety of the voyage insured, the freight being covenanted to be paid for the said voyage, according to a stipulated rate per pipe for 500 pipes of wine; whereas this was an open policy, and the freight was to be estimated according to the quantity of goods on board, of which there never were any, and, therefore, no inception of the freight, and, consequently, not of the insurance upon it: and this, it was argued, was the same as if the ship had sailed from Dominica without any goods on board; but the objection was overruled; Lord *Ellenborough*, C. J., observing, that it was clear that the underwriter was liable, upon the authority of *Thompson v. Taylor*, the voyage having commenced in which the freight was to be earned according to the terms of the charter-party, which made it one entire contract, and which voyage was insured by the policy; that in *Thompson v. Taylor*, the loss happened before the ship arrived at Teneriffe, where she was going to fetch her freight, and yet the underwriter was holden to be liable (a).

Freight may be insured for part of an entire voyage; and if the ship be on the voyage insured when the loss happens, the assured will be entitled to recover, although the ultimate destination of the ship was not disclosed to the underwriter (b). On a policy on goods at and from Plymouth to Malta, with liberty to touch at Penzance, or any other port in the channel to the westward, for any purpose whatever, beginning the adventure from the loading the goods on board the ship as above; it was held, that goods loaded at Penzance were protected by the policy (c). A policy on freight, at and from the ship's port of loading at J. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, *with leave to discharge, exchange, and take on board goods at any port she may call at*, without being deemed a deviation, covers the freight of goods loaded at an intermediate port; and therefore, where the ship having sailed with a cargo loaded at J. was, during the voyage, cast on shore at an intermediate port, and lost a part of her cargo,

(a) *Horncastle v. Suart*, 7 East, 400.

(b) *Taylor v. Wilson*, 15 East, 324.

(c) *Violett v. Allnutt*, 3 Taunt. 419.

recognized in *Leathley v. Hunter*, 7 Bingh. 529.

and took on board other goods at that port to complete her cargo, and arrived at her port of discharge and earned freight; it was held, that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight (*d*).

Freight is not lost by perils of the sea simply because the cost of the repair of sea damage necessary to earn it would be greater than the freight. The prudent owner principle only applies to constructive total loss of ship or cargo by damage thereto, not to expense and labour of earning freight (*e*).

In an action on a policy on freight it appeared, that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port, and land the whole of her cargo. Part of her cargo had been so wetted by sea-water that it could not be reshipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expense equal to the freight. Under these circumstances, the master sold these goods, and finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted. It was held, that the underwriters were not liable for the loss of the freight of these goods (*f*).

A shipowner is entitled to recover upon a policy of insurance for freight for a loss accruing to him by reason of his having been deprived of the means of carrying his own goods in his own ship (*g*). A homeward policy on freight, at and from A., attaches when the ship is at A. in a condition to begin to take in her homeward cargo, which is a question of fact for the jury (*h*).

IV. Of Losses.

1. *By Perils of the Sea*, p. 894.
2. *By Capture*, p. 897.
3. *By Arrests, &c.*, p. 899.
4. *By Barratry*, p. 901.
5. *By Fire*, p. 904.
6. *By other Losses*, p. 905.

1. *By Perils of the Sea*.—Losses by *perils of the sea* are under-

(*d*) *Barclay v. Stirling*, 5 M. & S. 6.
 (*e*) *Philpott v. Swann*, 11 C. B. (N. S.) 282; 30 L. J., C. P. 358; *Moss v. Smith*, 9 C. B. 94.

(*f*) *Mordy v. Jones*, 4 B. & C. 394; *Brockelbank v. Sugrue*, 1 M. & Rob. 102.

(*g*) *Flint v. Flemyng*, 1 B. & Ad. 45, recognized in *Devaux v. J'Anson*, 5 B. N. C. 519.

(*h*) *Williamson v. Innes*, 1 M. & Rob. 88, *Lyndhurst*, C. B. See *Devaux v. J'Anson*, 5 B. N. C. 519.

stood to mean only such as proceed from mere sea damage (*i*), that is, such as arise from stress of weather, winds, and waves, from lightning and tempests, from striking against rocks, from sands, &c. A loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by perils of the sea (*j*).

If there has not been any intelligence received of a ship within a reasonable time after she has sailed (*k*), it will be presumed that she foundered at sea, and the assured may maintain an action against the underwriter, stating the loss to have happened by the vessel sinking at sea (*l*). What shall be deemed a reasonable time must depend on the distance and length of the voyage, &c. Evidence of the vessel having sailed on her intended voyage on such a day, and not having been heard of since, is the best evidence of which the nature of such a case admits, and consequently will be sufficient to support the action. It is not necessary to call witnesses from the vessel's port of destination; it is sufficient to prove that she was not heard of in this country after she sailed (*m*). But it must be shown, that when the ship left the port of outfit, she was bound on the voyage insured (*n*). For this purpose the *convoy bond* (*o*), mentioning the port of destination in the common form, or a licence (*p*), is *prima facie* evidence. Insurance on goods by a certain ship from Leghorn to Lisbon. At the trial in 1826, the evidence was, that the vessel with the goods insured on board, sailed from Leghorn in April, 1821, for Lisbon; that she never arrived at that place: and that, a few days after her departure for Leghorn, the witness heard that she had foundered of the sea, but that the crew were saved; held, that this was sufficient *prima facie* evidence of a loss by perils of the sea, and that it was not necessary for the plaintiff to call any of the crew, or to account for their non-attendance (*q*).

Upon a policy of insurance on goods, where the ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses; it was held, that the underwriter was not answerable for this loss (*r*). Under a count for a loss by perils of the sea, evidence that the ship was destroyed by a species of worms, which infest the rivers of Africa, was held not to support the declara-

(*i*) Marsh. 386.

(*j*) *Smith v. Scott*, 4 Taunt. 126.

(*k*) Park, 147.

(*l*) *Green v. Brown*, Str. 1199. See also *Newby v. Read*, Sittings after M. T. 1763, coram Lord Mansfield, C. J., Park, 106.

(*m*) *Twemlow v. Oswin*, 2 Campb. 85.

(*n*) *Cohen v. Hinckley*, 2 Campb. 51;

Koster v. Innes, Ry. & M. 333.

(*o*) 2 Campb. 51.

(*p*) *Marshall v. Parker*, 2 Campb. 69

(*q*) *Koster v. Reed*, 6 B. & C. 19.

(*r*) *Powell and another v. Gudgeon*, 5 M. & S. 431; *Sarguy v. Hobson*, 2 B. & C. 7; judgment affirmed on error, in Exch. Chamb., 4 Bingh. 131.

tion (*s*). So damage done to a ship by rats eating holes in the ship's bottom, has been held not to be a loss through perils of the sea (*t*). If a ship hove down on a beach within the tideway to repair, be thereby bilged and damaged, it is not a loss occasioned by the perils of the sea (*u*). A transport in the service of government was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her, she received damage by taking the ground: it was held, that this was a loss by a peril of the sea (*x*). So in an insurance on goods in a ship warranted free from capture and seizure. The ship was stranded on a shoal within a few miles of the port of destination, and disabled from proceeding; but while she lay in the sand, she was seized by the commander of the place at which she was stranded; and the goods were confiscated by him: it was held, a loss of the goods by the perils of the sea (*y*).

A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage some of the animals, in consequence of the agitation of the ship in the storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured; it was held, that this was a loss by a peril of the sea, for which the underwriters were liable (*z*). In a similar case, where it was found in the special verdict, that a certain usage, with respect to such policies, prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-house in London, and merchants and others effecting policies there, and that the policy in question was effected at Lloyd's Coffee-house; but it was not found that the plaintiff was in the habit of effecting policies at that place: it was held, that this usage was not sufficient to bind the plaintiff (*a*). A ship loaded with hides and tobacco whilst on her voyage encountered bad weather, and shipped much sea water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by the sea water, but the tobacco was damaged and deteriorated in flavour by the foetid odour proceeding from the putrid hides: it was held, that this was a loss by perils of the sea (*b*). An averment of loss by perils of the sea, is not supported by proof that the vessel was sunk in consequence of being fired upon by another vessel, under a mistake (*c*). It is the province of the jury to determine whether the cause of the loss be a peril of the

(*s*) *Rohl v. Parr*, London Sittings after H. T. 1796, Park, 105.

(*t*) *Hunter v. Potts*, 4 Campb. 203; but see *Laveroni v. Drury*, 8 Exch. 166.

(*u*) *Thompson v. Whitmore*, 3 Taunt. 227.

(*x*) *Fletcher v. Inglis*, 2 B. & A. 315.

(*y*) *Hahn v. Corbett*, 2 Bingh. 205.

(*z*) *Lawrence v. Aberdeen*, 5 B. & A. 107.

(*a*) *Gabay and another v. Lloyd*, 3 B. & C. 793.

(*b*) *Montoya v. London Assurance Company*, 6 Exch. 451; 24 L. J., Exch. 254.

(*c*) *Cullen v. Butler*, 1 Stark. N. P. C. 138, Ld. *Ellenborough*, C. J.

sea or not (*d*). In cases of insurance upon goods, where, by the terms of the policy, the underwriter is to continue liable until the goods are safely landed, if one of the public lighters, entered at Waterman's Hall, be employed for the purpose of landing the goods, and the goods sustain a damage on board such lighter, without any negligence on the part of the lighterman, the underwriter will be responsible for the loss (*e*); but if the owner of the goods chooses to employ his own private lighter to land them (*f*), or if after the goods are put on board a public lighter, the owner takes them into his own custody and possession, and discharges the lighterman, the underwriter in such cases will not be liable (*g*).

2. Loss by Capture,

Capture is the taking the ship or goods by an enemy of the country to which the ship and goods belong, when in a state of public war.

To constitute a loss by capture within the meaning of the policy, it is not necessary that the ship should be condemned or carried into any port or fleet of the enemy (*h*). In every case of capture the insurer is answerable to the extent of the sum insured for the loss actually sustained. This may be either *total*, as where the thing insured is not recovered again; or *partial*, as where the ship is recaptured or restored *before abandonment*; in which case the insurer is bound to pay the salvage, and any other necessary expense which may have been incurred by the party for the recovery of his property (*i*), and the insurer is liable although the capture be unlawful (*k*). In *assumpsit* upon a policy of insurance, *interest or no interest*, against enemies, pirates, takings at sea, &c., it appeared, that the ship was taken by a Swedish pirate, and remained in his possession nine days, and then was retaken by an English man-of-war, and, after the suit commenced, brought into Harwich: it was held, that the plaintiff was entitled to recover: for though the ship was retaken, yet the plaintiff had received a damage by the interruption of his voyage; and the question was not whether the plaintiff had his ship, and did not lose his property, but what damage he had sustained (*l*). In a case where a privateer had been insured, *interest or no interest, free from average, and without benefit of salvage*, for a cruise of three months, and during that time she was captured, whereby she was prevented from finishing her cruise: it was held, that the assured was entitled to

(*d*) *Per Kenyon, C. J.*, in *Buller v. Fisher*, Abbott, 236.

(*e*) *Rucker v. London Assurance Comp.*, London Sittings, June, 1784, *per Buller, J.*; *Hurry v. Royal Exch. Ass. Comp.*, 2 B. & P. 430.

(*f*) *Sparrow v. Carruthers*, Str. 1236.

(*g*) *Strong v. Natally*, 1 B. & P., N.

R. 16. See *Hoffman v. Marshall*, 2 Bingh. N. C. 383; 2 Scott. 559; and *ante*, p. 885.

(*h*) *Per Lord Mansfield, C. J.*, in *Goss v. Withers*, 2 Burr. 694.

(*i*) *Marsh*. 398.

(*k*) *Powell v. Hyde*, 5 E. & B. 607.

(*l*) *Depaba v. Ludlow*, Comyns' R. 360.

recover for a *total* loss, although it did not appear that the ship was ever carried *infra præsidia hostium*, and although the ship was retaken before the expiration of the three months (m).

A ship warranted neutral was captured as an enemy's ship, and the owners, after an interlocutory decree against them, agreed to a compromise, this being done *bonâ fide*; it was held, that the insurer was liable for the sum paid by the insured under such compromise (n). Formerly, it was a common practice, when vessels were captured by the King's enemies, or by other persons committing acts of hostility, for persons to agree with the captors for ransom of the vessels, and for securing the stipulated ransom, not only to give hostages, but also to bind themselves or the owners, for the payment thereof. The law of nations gave a sanction to this practice; but it having been found, by experience, liable to great abuse, and there being reason to apprehend that, upon the whole, it operated more to the disadvantage than the benefit of his Majesty's subjects, the legislature interposed, and prohibited it (o).

Although, by the terms of the policy, the underwriters undertake to indemnify the assured against *all* captures and detentions of princes, without any exception in respect to the acts of the government of their own nation, yet has the law engrafted an exception thereon of captures made by the authority of the government of the country to which the underwriters belong. Hence, it has been solemnly determined that even after the cessation of hostilities between England and France, a Frenchman was not entitled to recover in the English courts upon a policy of insurance effected in England before the commencement of hostilities; for a policy, containing an insurance against British capture, *eo nomine*, would be illegal and void upon the face of it, as being directly and obviously repugnant to the interest of the state, having immediate tendency to render ineffectual, to the extent of the indemnity created thereby, all offensive operations by sea adopted on the part of his Majesty and his subjects, for the purpose of weakening the strength and diminishing the resources of the enemy. And if an insurance by a British subject, made in terms against British capture, would be void, an insurance indirectly producing the same effect, by the application afterwards of the general terms of the insurance to the particular event (*i. e.*) of British capture, which takes place afterwards, must, upon principle, be equally illegal; and no peril, the subject of insurance, can be recovered under the generality of the terms "capture," "detention of princes," or the like, which cannot, consistently with law, be specifically insured against in direct and express terms.

(m) *Pond v. King*, 1 Wils. 191. See further on this subject, *Whitehead v. France*, Park 77, and *Dean v. Dicker*, Str. 1250.

(n) *Berens v. Rucker*, 1 Bl. R. 313.

(o) See stat. 22 Geo. III. c. 25, s. 1; 33 Geo. III. c. 66, ss. 37, 38; 43 Geo. III. c. 160, ss. 34, 35.

Declaration on a voyage policy from Macao to Havana, "warranted free from capture and *seizure*, and the consequences of any attempt thereat." The usual clause stating the perils insured against, included "enemies, pirates, rovers, thieves, surprisals, takings at sea, and barratry of the master and mariners." The insurance was declared to be on 7,300*l.*, expended in provisions for the use of Chinese emigrants, and in advances on freight. The declaration alleged that while the ship was on her said voyage on the high seas, the said emigrants piratically and feloniously assaulted the captain and crew, and took, stole, and carried away the ship and provisions, by reason of which piracy and theft, the ship and provisions were wholly lost. On demurrer, it was held, that this was a *seizure* within the meaning of the warranty, and that the insurers were therefore not liable (*p*).

3. Loss by Arrests, &c.

Among other perils which the insurers, in the language of the policy, are contented to bear, and do take upon them in the voyage, are "arrests and detainments of all kings, princes (*q*), and people, of what nation, condition, or quality soever." The word people means the ruling and supreme power of the country, whatever it may be. This appears clearly from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of pirates, rogues, thieves. The words, therefore, "kings, princes, and *people*," must apply to nations in their collective capacity. Hence, where a party of rioters boarded a ship, and having taken the command, stranded her, and compelled the captain to sell the cargo, which consisted of wheat, at their own price, and much below its real value; it was held that the plaintiff, who had insured the cargo, could not recover on a count stating that the vessel was *arrested, distrained, and detained by people*, to the plaintiff unknown, by reason whereof the cargo was wholly lost to the plaintiff (*r*). Upon a common policy on goods, the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees (*s*). Policy on goods at and from London to Archangel, "until the goods should be there discharged and safely landed." The declaration averred that the ship arrived at Archangel; but that before the goods were dis-

(*p*) *Kleinwort v. Shepard*, 1 E. & E. 447.

(*q*) By the word "princes," according to the opinion of Lord Mansfield, in *Goss v. Withers*, 2 Burr. 696, must be understood, not enemies merely, but those in

amity also. Hence it is said, that, by the general law, the assured may abandon in the case of an arrest or detainment by a prince, not an enemy.

(*r*) *Nesbitt v. Lushington*, 4 T. R. 783.

(*s*) *Brown v. Carstairs*, 3 Campb. 161.

charged or safely landed, they were seized and detained by the persons exercising the powers of government there. It appeared in evidence, that as soon as the vessel arrived at Archangel, her hatches were sealed down, and a custom-house officer remained constantly on board. Leave was refused to unload the cargo for several weeks; and at last it was unloaded into praams or lighters belonging to the government, under the inspection of an officer, and lodged in a government warehouse, where the consignees had no control over it, and were not even permitted to see it. The whole was afterwards condemned, on the ground that the ship had come from London instead of Teneriffe, as was represented by the simulated papers which she carried. It appeared, however, to be the uniform course of transacting business at Archangel, that when a ship arrives, her hatches are sealed down, that a custom-house officer remains on board till she is unloaded, and that the goods must be carried in the first instance to the government warehouses, where they remain till the duties are paid. Under these circumstances Lord *Ellenborough* was of opinion, that there was not any evidence, that the goods were seized and detained by the Russian government before they were discharged and safely landed—that the goods were landed according to the usual course of trade at the port of Archangel; and, consequently, that the underwriters on the policy were not liable for any subsequent loss (*t*). In a declaration on a policy on goods, it was averred, that the ship with the goods on board, when at C., was arrested by the persons exercising the powers of government there, and the goods were by the said persons seized and confiscated. It was proved, that on the ship's arrival at C., her hatches were sealed down, and her cargo was afterwards forcibly unloaded by the officers of government, and never delivered to the consignees. This was held to be sufficient proof of the averment, without the production of any sentence of condemnation (*u*).

Embargo.—Under this head it will be proper to consider the effect and operation of an embargo on the contract of insurance. An embargo is an arrest laid on ships or merchandize by public authority, or a prohibition of state, commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports. Where a neutral insures in this country a ship “at and from a port in a foreign country;” and while the ship remains in that port, an embargo is laid on by the *foreign state*, the assured will, if the embargo continue, be entitled to abandon, and to recover for a total loss; for such an embargo is within the meaning of the words, “arrests, restraints, and distrainments by kings, princes, and people” (*x*). There is a distinction in this respect, between an embargo in a

(*t*) *Brown v. Carstairs*, 3 Campb. 161.

(*u*) *Carruthers v. Gray*, 3 Campb. 142.

(*x*) *Rotch v. Edie*, 6 T. R. 413.

time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility, either existing or expected, and an embargo connected with such hostility. *Quære* if the act of seizure was a lawful act by the municipal law of the country of the assured, whether such seizure would be within the assurance (*y*). Although, in cases of capture, the underwriter is responsible to the assured, yet, if *before a demand* the ship be recovered, he is liable for the amount only of the loss sustained at the time of the demand; or if the ship be restored after payment by the underwriter, he shall stand in the place of the assured (*z*). What would be the effect of an embargo laid by the government of this country upon a ship insured here, has not been solemnly determined. It seems, however, that although one British subject might insure another British subject against the consequences of an embargo laid on by the British government (*a*), yet an insurance for the benefit of a *foreigner* against such an embargo would be illegal (*b*).

4. Loss by Barratry.

The original meaning of the term "barratry," is to be collected from the Italian language, and is, according to Dufresne's Glossary (*verbum barratria*), "*fraus, dolus, qui fit in contractibus et venditionibus*" (*c*). He does not apply it in any marine sense, or with reference to the particular relation of masters and owners. In that sense, however, in which it is particularly used, as applied to subjects of British marine insurance, in the earliest reported case (*d*), which we find on the subject, it is considered as being precisely tantamount to fraud, in the particular relation which subsists between master mariners and owner, being such by which a loss may happen on the subject-matter insured. And as no limitation is put upon the term "fraud," in that case, the court must be understood as holding, that fraud and barratry were in effect words of co-extensive import: that is, that barratry included *every species of fraud*, in the relation of the master to his owners, by which the subject-matter insured might be endangered. In conformity with this opinion, *Willes, J.*, in giving the judgment of the court in *Lockyer v. Offley*, 1 T. R. 252, defines *barratry*, as including "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners *pro tempore*) are injured." It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and

(*y*) *Aubert v. Grey*, 3 B. & S. 163, in error; 32 L. J., Q. B. 50, in error.

(*z*) *Furtado v. Rodgers*, 3 B. & P. 191; *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407.

(*a*) See *Marsh. 437*; *Green v. Young*, Ld. Raym. 840; *Salk. 444*; and Lord *Alvanley's* opinion in *Touteng v. Hub-*

bard, 3 B. & P. 302.

(*b*) Opinion of the judges in *Touteng v. Hubbard*, 3 B. & P. 302.

(*c*) *Per Lord Ellenborough*, C. J., delivering the judgment of the court in *Earle v. Rowcroft*, 8 East, 134.

(*d*) *Knight v. Cambridge*, Str. 581.

appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between them, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So, however, it is, that this description of loss has, from the earliest times, held its place as a subject of indemnity in British policies of insurance" (e). Barratry may be committed either by a wilful deviation (f), in fraud of the owner, by smuggling (g), by running away with the ship, by sinking or deserting her, or by defeating or delaying the voyage with a criminal intent. "Even dropping anchor *with a fraudulent intent* is barratry" (h).

If by reason of these, or other similar acts, the subject-matter insured is detained, lost or forfeited, the assured will be entitled to recover against the underwriter for a loss by barratry; and such acts being in violation of that duty which the masters and mariners owe to the shipowners, the circumstance of the master or mariners conceiving that they were acting for the benefit of the owners will not vary the case. Hence where the master under letters of marque, which, for want of a certificate, were not valid, (and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising,) had cruized for and taken a prize, in consequence whereof the vessel was lost; it was held to be an act of barratry, although the master had libelled the prize in a court of admiralty, for the benefit of the owners as well as himself (i). Neither is it necessary, in order to constitute barratry, that the master should derive, or even intend to derive, any benefit from the act done. Hence, where the master sailed out of port, without paying the port duties, whereby the ship was forfeited; it was held to be barratry (k). So where the master, under general instructions from his owners to make the best purchases, with dispatch, went into an enemy's port and traded there, on account of which illegal traffic, the vessel insured was seized by a king's ship, and afterwards condemned; this illegal act, unauthorized by the shipowners, was held to be barratry, although it did not appear that the master would have been benefited by the act, or that he intended thereby anything more than to make the cheapest and speediest purchases for his employers. It was contended in this case, on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were, in his opinion, likely to advance the

(e) *Per Lord Ellenborough*, C. J., in *Earle v. Rowcroft*, 8 East, 134.

(f) *Vallejo v. Wheeler*, Cowp. 143.

(g) 1 T. R. 252.

(h) *Per Buller*, J., in *Ross v. Hunter*,

4 T. R. 38.

(i) *Moss v. Byrom*, 6 T. R. 379.

(k) *Knight v. Cambridge*, as cited in 8 East, 135, 136.

owner's interest, and intended by him to do so, it would not be barratry; but to this the court said they could not assent, for it was not for him to judge in cases not intrusted to his discretion; or to suppose that he was not breaking the trust reposed in him, by acting meritoriously, when he endeavoured to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also, from a consideration of the risk and loss likely to follow from the use of such means (*l*). In order, however, to constitute barratry, it is essentially necessary that there should be fraud.

Hence, a simple deviation, through the ignorance of the master, *without fraud* on his part, although it avoids the policy, will not amount to barratry (*m*). "Barratry must be some breach of trust in the master *ex malificio*" (*n*). So negligent conduct on the part of the master, though a wilful default by s. 299 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), does not amount to barratry (*o*). It is to be observed that barratry, in the sense in which it is used in our policies, cannot be committed by any persons except masters or mariners, nor against any persons except the owners of the ship; but this term comprehends not only absolute owners, but owners *pro hac vice*, only as general freighters (*p*). Hence, if A. be the owner of a ship, and let it out to B. as freighter, who insures it for the voyage, and the barratrous act, whereby the vessel is lost, is committed with the knowledge of A., yet if it be unknown to B., he may recover against the underwriter for a loss by barratry (*q*). So where the insurance is made by and in favour of the shipowner, and the barratrous act is committed with the privity of the freighter, the underwriter is not discharged, unless he can show that the shipowner also was privy to the barratry (*r*).

It appears, from the preceding remarks, that where the owner of the ship consents to the act done, such act is not barratry (*s*). So where the master of the ship is also owner he cannot commit barratry, because he cannot commit fraud against himself (*t*). And the same rule holds in equity, where the owner, having mortgaged the ship, acts as master, for the mortgagor is considered in equity

(*l*) *Earle v. Rowcroft*, 8 East, 126.

(*m*) *Phyn v. Royal Exch. Ass. Comp.*, 7 T. R. 505.

(*n*) *Per Lee*, C. J., in *Stamma v. Brown*, as cited by *Lawrence*, J., from a MS. note in 7 T. R. 508.

(*o*) *Grill v. The General Iron Screw Company*, L. R. 3, C. P. 476 (in error).

(*p*) *Nutt v. Bourdieu*, 1 T. R. 323.

(*q*) *Vallejo v. Wheeler*, Cowp. 143. But see *Hobbs v. Hannam*, 3 Campb. 94, where it was held, that if a chartered ship be lost, by means of the captain

engaging in an illegal trade, in obedience to the orders of the charterer, this is not a loss by barratry for which the shipowner can recover against the underwriters.

(*r*) *Boutflower v. Wilmer*, London Sitings after T. T. 21 Geo. II., coram *Lee*, C. J., MSS.

(*s*) *Stamma v. Brown*, Str. 1173; *Nutt v. Bourdieu*, 1 T. R. 323.

(*t*) *Admitted S. C.*, and in *Ross v. Hunter*, 4 T. R. 33.

as the owner of the thing mortgaged (u). But where the master is part owner only he may commit barratry (v). Proof of the master having committed barratry is *prima facie* sufficient to entitle plaintiff to recover, without showing negatively that the master was not owner or general freighter. If the underwriter insists on this as a defence, it is incumbent on him to show that the master was also owner or general freighter. Barratry cannot be committed against the owner of the ship with his consent. It is not necessary that the loss, in consequence of the barratry, should happen in the very act of committing the barratry: it is sufficient if it happen at any time afterwards, and before the voyage insured is completed; but it must happen during the voyage insured, and within the time limited by the policy; for where the master, in the course of the voyage, committed barratry by smuggling, on his own account, by hovering, and running brandy on shore in casks under sixty gallons, and the ship afterwards arrived at the port of destination and was there moored at anchor twenty-four hours in safety, after which she was seized by the revenue officers for the smuggling; it was held, that the underwriter was discharged (x). The captain of a ship insured, barratrously carried her out of the course of her voyage, procured her to be condemned in a vice-admiralty court, sold her, and delivered her to the purchaser. In an action on the policy, to which the Statute of Limitations was pleaded, Lord *Ellenborough* was of opinion, that the cause of action did not accrue, as the loss did not happen, until the master had divested himself of the possession of the ship, by delivering her to the purchaser; and therefore, although the barratrous abandonment of the voyage, for the purpose of making away with the ship, and fraudulent condemnation, had taken place more than six years before the commencement of the action, yet as the sale and delivery were within six years, the plea did not operate as a bar (y). As it is not necessary to aver the fact whereby the loss is occasioned, in the very words of the policy, provided the fact alleged be within the meaning of these words; in a case where, by the policy, the insurance was against the barratry of the master, and the breach assigned in the declaration was, that the ship was lost by the fraud and neglect of the master, the declaration was held to be good; for barratry imports fraud, and he who commits a fraud may properly be said to be guilty of neglect, *viz.* of his duty (z).

5. Loss by Fire.

Fire is expressly mentioned in the policy, as one of the perils against which the underwriters agree to indemnify the assured. In an action on a policy, where the loss was stated to be by fire, it

(u) *Lewin v. Suasso*, Postleth. Dict. vol. 1, p. 147, per Lord *Hardwicke*, Ch.

(v) *Jones v. Nicholson*, 10 Exch. 28; 23 L. J., Exch. 330.

(x) *Lockyer v. Offley*, 1 T. R. 252.

(y) *Hibbert v. Martin*, 1 Campb. 539.

(z) *Knight v. Cambridge*, Lord *Ramy*. 1349; Str. 581; 3 Mod. 230.

appeared that the ship in question having been chased by an enemy of superior force, the captain, in order to prevent her from falling into the hands of the enemy, set her on fire. It was held, that this loss was covered by the policy; Lord *Ellenborough*, C. J., observing, that if the ship is destroyed, it is immaterial whether it is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor could it make any difference whether the ship was thus destroyed by third persons, subjects of the king, or by the captain and crew, acting with loyalty and good faith. Fire was still the *causa causans*, and the loss within the perils insured against (a). If a fire arises on board a ship from the damaged quality of the goods insured, the underwriters on the goods are not liable; but if the loss is not so occasioned, the policy will not be vitiated by the non-disclosure of the condition of the goods to the underwriter (b). Upon a policy on a ship by which the underwriters insured against fire and barratry of the master and mariners, it was held, that the underwriters were liable for a loss by fire, occasioned by the negligence of the master and mariners (c).

6. *By other Losses.*

These general words were not the immediate subject of judicial construction in our courts, until the case of *Cullen v. Butler*, 5 M. & S. 461. There the master and crew of a British ship, believing the ship insured to be an enemy's ship about to attack them, fired at her and sunk her with the goods on board. This loss was specially set forth in the second count of the declaration; and the court held, that the plaintiff was entitled to recover upon it, inasmuch as it fell within the general and comprehensive words in the policy subjoined to the particular causes of loss, *viz.*, "*All other perils, losses, and misfortunes, which had or should come to the damage of the goods and ship, or any part thereof.*" In an action on a policy of insurance, from Spain to Cuba and the Spanish Main, the declaration stated the insurance to be on dollars. The interest was averred to be in a subject of the King of Spain. It stated that hostilities had commenced between Spain and South America. The loss was stated as follows: namely, that while the ship was on her voyage, an armed vessel proceeded from a ship acting under the authority of persons exercising the powers of government in South America, made up to the ship, on board of which the dollars were, in order to attack her; and that the master, in order to prevent the dollars from falling into their hands, threw them overboard. It then stated, that the armed boat did attack the ship, and capture her. To this declaration there was a general demurrer; and the question was, whether this was a loss within the policy. It was held, that it was; that, taking all the circum-

(a) *Gordon v. Rimmington*, 1 Campb. 123.

(c) *Busk v. Royal Exch. Ass. Comp.*, 2 B. & A. 73.

(b) *Boyd v. Dubois*, 3 Campb. 133.

stances together, it must be considered that the master acted properly in throwing the dollars overboard. If the defendant had intended to dispute that, he should have gone to trial. They said they considered that this was a loss by jettison which meant any throwing overboard *ex justâ causâ*. All the foreign writers agree that the master may set fire to a ship, to prevent its falling into an enemy's hands. This case fell within the same principle. The dollars would have been useful to the enemy in the prosecution of the war. It was the master's duty to prevent the enemy from seizing them. The circumstances of the insurer not being a subject of Spain could make no difference. They said that this might also be considered as a loss by enemies, and would also fall within the general words "other losses" (d). Where, in an action on a policy of insurance on a ship in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of St. J., and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c. It was held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c.," for which the underwriters were liable. Held also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea (e). An underwriter is liable for losses occurring in the transshipment of goods from the ship to the place of landing, where such transshipment is in the usual course of the voyage, although such risk be not specially mentioned in the policy (f).

V. Of Total Losses and Abandonment.

A total loss is of two kinds: one, where the whole property insured perishes; the other, where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it (g). In the latter case, the assured *may* elect to abandon to the underwriter all right to such part of the property as may be saved, and having given due notice of his intention to do so, the assured will then be entitled to demand a compensation as

(d) *Butler v. Wildman*, 3 B. & A. 398.

(e) *Phillips and another v. Barber*, 5 B. & A. 161. See *Devaux v. J'Anson*, 5 B. N. C. 519.

(f) *Stewart v. Bell*, 5 B. & A. 238. See *Harrison v. Ellis*, 26 L. J., Q. B. 239.

(g) If the voyage be defeated, it is the same thing for this purpose as if the ship be lost. *Lawrence, J.*, 6 T. R. 425. But see *Parsons v. Scott*, 2 Taunt. 363, and *Anderson v. Wallis*, 3 Campb. 440; 2 M. & S. 240, and *post*, p. 914. See also *Hunt v. Royal Exch. Ass. Comp.*, 5 M. & S. 47.

for a total loss ; but if the assured does not in fact abandon (*h*), or if he omits to give the underwriter notice (*i*) of his having abandoned, or if, being required by the underwriter to assign over his interest in the property insured, he refuses so to do (*k*), he will not be entitled to claim as for a total loss ; unless, in the conclusion, there be an actual total loss (*l*).

If the subject-matter of insurance ultimately exist in specie, so as to be capable of being restored to the hands of the assured, there cannot be a total loss, unless there has been an abandonment (*m*). And in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss (*n*). The question whether the loss be partial or total is precisely the same, whether the policy be valued or open (*o*). In *Irving v. Manning, Patteson, J.*, in delivering the opinion of the judges, referring to the case of *Allen v. Sugrue*, and other cases, said : "The principle laid down in these latter cases is this : that the question of loss, whether total or partial, is to be determined just as if there were no policy at all, and the established mode of putting the question, when there has been what is, perhaps improperly, called a constructive total loss of a ship, is to consider the policy as altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against : if he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed. In an open policy, the amount of compensation must be then ascertained by evidence ; in a valued one the agreed total value is conclusive ; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss. It is argued, that this course of proceeding infringes on the generally-received rule, that an insurance is a mere contract of indemnity, for that thus the assured may obtain more than a compensation for his loss ;

(*h*) An assurance was effected on some hogsheads of sugar on a voyage from Ostend to Havre. The vessel sailed from Ostend, but was forced on shore, and the cargo damaged. The assured wrote to the underwriters, to inform them of the circumstances, and of the injury which the sugars had sustained. The underwriters, in answer, desired "that the assured would do the best with the damaged property." It was held, that the letter, coupled with the answer, did not amount to abandonment. *Thelluson v. Fletcher*, 1 Esp. N. P. C. 73, per *Kenyon, C. J.* "The abandonment must be direct and express, and I think the word *abandon* should be used to make it effectual." *Parmeter v. Todhunter*, 1 Campb. 542, per Lord *Ellenborough*. See further,

King v. Walker, 3 H. & C. 209 ; 33 L. J., Ex. 325.

(*i*) Notice of abandonment is necessary, although the ship and cargo have been sold and converted into money, when the notice of the loss was received. *Hodgson v. Blackiston*, Park, 400, n.

(*k*) *Havelock v. Rockwood*, 8 T. R. 268, more fully reported by N. Atcheson, 8vo. 1800.

(*l*) *Mellish v. Andrews*, 15 East, 13.

(*m*) *Per Bayley, J.*, in *Holdsworth v. Wise*, 7 B. & C. 798 ; and see *Fleming v. Smith*, 1 H. L. Cas. 535 ; and *Knight v. Faith*, 15 Q. B. 659.

(*n*) *Holdsworth v. Wise*, 7 B. & C. 799.

(*o*) *Allen v. Sugrue*, 8 B. & C. 561. See also *Stewart v. Greenock*, 2 H. L. Cas. 159.

and it is so. A policy of insurance is not a perfect contract of indemnity: it must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages, as indeed they may in other contracts to indemnify" (*p*).

Capture, or the necessary desertion of the ship, constitutes a total loss (*q*); and the mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss, unless the ship be in this kingdom under such circumstances, that the assured may, if they please, take possession (*r*). Insurance on goods. The vessel was wrecked, part of the goods were lost, and part got on shore, but (whilst on shore) were destroyed and plundered by the inhabitants of the coast of the Isle of France, so that no portion of them came again into the possession of the assured. It was held, that this was a total loss by perils of the sea, and no notice of abandonment was necessary (*s*).

"Where memorandum goods of the same species are shipped, whether in bulk or in packages, and whether expressed by distinct valuation or otherwise in the policy, to be separately insured, and there is no general average or stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package, or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils" (*t*). But where articles essentially different were insured, as "master's effects," and the master saved his chronometer and a few other articles, but the rest were totally lost, the value of these was held to be recoverable from the underwriters (*u*).

An insurance was effected on freight, and on the cargo from Quebec to London. The ship sailed from Quebec, and on her voyage sprung a leak, and in that state was run aground on a reef of rocks, and was in imminent danger of being carried away and destroyed; whereupon the captain, by the advice of a surveyor and of an agent for the owners, who was also a part owner himself, sold the ship and cargo. The ship was afterwards saved by the purchasers, and repaired, and brought a cargo to London. In an action by the assured against the underwriters on freight for a total loss, the jury found that, in effecting the sale, the master had acted fairly for the benefit of all concerned; and the court, upon special verdict, held, that the captain was justified in making such sale,

(*p*) *Irving v. Manning*, 1 H. L. Cas. 817.

(*q*) *Per Bayley, J., Holdsworth v. Wise*, 7 B. & C. 799. See *Chapman v. Benson*, 5 C. B. 330; *Dean v. Hornby*, 23 L. J., Q. B. 129; 3 E. & B. 180.

(*r*) *M'Iver v. Henderson*, 4 M. & S. 576; *Cologan v. The London Ass. Comp.*, 5 M. & S. 447.

(*s*) *Bondrett v. Hentigg*, 1 Holt's N. P. C. 149, C. B., *Gibbs*, C. J.

(*t*) Judgment of the Court of Error in *Ralli v. Johnson*, 6 E. & B. 422; 25 L. J., Q. B. 300; *Entwistle v. Ellis*, 6 W. R. 76.

(*u*) *Duff v. Mackenzie*, 26 L. J., C. P. 313; *Wilkinson v. Hyde*, 27 L. J., C. P. 116.

and that an abandonment of freight was not necessary, inasmuch as there was nothing to abandon; for the sale being right, the ship and cargo were gone into different hands; and she could not earn freight for the underwriters (x). As in these cases of sale, the exercise of a right judgment of the master is in question; questions are admissible to show that he is an habitual drunkard (y).

In a case where hides insured from Valparaiso to Bordeaux, free of particular average, unless the ship were stranded, arriving at Rio Janeiro on their way to Bordeaux, in a state of incipient putridity occasioned by a leak, were sold for one quarter of the value at Rio, because, by the process of putrefaction, they would have been destroyed before they could have reached Bordeaux. The assured received news of the damage to the hides, and their sale at the same time. It was held, that the assured might recover as for a total loss without abandonment (z). It was there observed by Lord Abinger, delivering the judgment of the court, that "if goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, that though the species be not utterly destroyed, they cannot with safety be reshipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that *forced termination* of the risk is of no importance. The loss is, in its nature, total to him who has no means of receiving his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." When the assured has received intelligence of such a loss as entitles him to abandon (a), it is incumbent on him to make his election to abandon and to give notice thereof to the underwriter *within a reasonable time* (b), after receipt of the intelligence; otherwise the assured will be considered as having waived his right to abandon, and in case any part of the property insured be saved, he can recover as for a partial loss only. But the assured is entitled to a reasonable time for acquiring a full knowledge of the state of a damaged cargo, before he is bound to elect, whether he shall abandon; therefore, where a ship bound from Liverpool to Calais, put back to Liverpool on the 20th of December, when the cargo, consisting of sugar, was

(x) *Idle v. Royal Exch. Ass. Comp.*, 8 Taunt. 755. See *Green v. Royal Exch. Ass. Comp.*, 6 Taunt. 68, and *Mount v. Harrison*, 4 Bingh. 388. *Benson v. Chapman*, (in error,) 5 C. B. 363.

(y) *Alcock v. Royal Exch. Ass. Comp.*, 13 Q. B. 292; 18 L. J., Q. B. 121.

(z) *Roux v. Salvador*, (in error), in Exch. Cham., 3 B. N. C. 266.

(a) *Mitchell v. Edie*, 1 T. R. 608; *Allwood v. Henckell*, Park, 399.

(b) *Barker v. Blakes*, 9 East, 283; *Hudson v. Harrison*, 3 B. & B. 97; *Davy v. Milford*, 15 East, 563.

immediately relanded and surveyed :—the owners in London received a letter from their agents at Liverpool, dated 29th of December, stating, that the cargo was much damaged, but that it was still in contemplation to send it on ; and another dated 7th of January, stating that, on further examination, the whole cargo was found to be damaged ; it was held, that the owners, on the receipt of the last letter, were still in time to abandon (c).

Insurance for 8000*l.* on ship *Vittoria*, and 4000*l.* on freight “at and from London to the East Indies, and back.” The ship sailed sea-worthy from Calcutta, on her voyage home, when, in addition to some damage which she sustained in the River Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back ; and he returned to Calcutta on the 30th of August, 1820. On his arrival at Calcutta, he gave notice of abandonment to the agents for Lloyd’s resident there, and requested that their surveyor might be present at the surveys of the ship. The agents said, they had no authority to accept the abandonment ; but their surveyor attended the surveys, when it was found, that the ship was so seriously damaged, that the expense of repairing her would be nearly 5000*l.* The agents refused to undertake the repairs ; and the captain, having in vain attempted to borrow money for that purpose by hypothecation of *ship*, sold the ship for 1200*l.*, conceiving that to be the best course for all parties. On the 25th of April, 1821, the captain arrived in London, where the owner resided ; and on the 3rd of May, the ship’s papers were delivered. On the 5th of May, the ship’s brokers abandoned to the underwriters. In an action on the policy on the ship, the jury having found a verdict for the plaintiff, as for a total loss, and that the captain had sold the ship from a justifiable cause, the court (*Richardson, J., dissentiente*), refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time (d). Where the sale of a ship and cargo is justifiable, no notice of abandonment is required to make a total loss on freight (e). The cost of the repairs of a ship which had been damaged in the course of the voyage, far exceeded the value of the ship and freight, and for which cost, the master, not being able to borrow the money in any other manner, executed a bottomry bond for the amount, charging the ship, freight, and cargo. The cargo having been taken out during the repairs, was reshipped, and eventually reached its port of destination. In an action against the underwriters on freight, claiming for a total loss, it was held, that the assured was not entitled to recover in respect either of a total or partial loss of freight, the freight having actually

(c) *Gernon v. Royal Exch. Ass. Comp.*, 6 Taunt. 383 ; 2 Marsh. R. 88.

(d) *Read v. Bonham*, 3 B. & B. 147, cited in *Roux v. Salvador*, 1 B. N. C.

542 ; 1 Sc. 491.

(e) *Idle v. Royal Exch. Ass. Comp.*, 8 Taunt. 755.

been earned, and its receipt by the obligee of the bottomry bond, being in law, a receipt by the plaintiff (*f*). Freight, while the ship is in a course of earning it, is a benefit or advantage incident to the ship, and as a general rule, becomes the property of the underwriters paying for a total loss (*g*). But if the same person is the owner of the goods and of the ship, and the ship is abandoned, the abandoners can claim compensation in the nature of freight only to the amount of any benefit which the owner of the goods may have derived from the use of the ship, subsequent to the calamity which caused the abandonment (*h*). The title of the underwriters to the cargo of an abandoned vessel does not date from the acceptance of the abandonment, but has relation back to the time of the loss (*i*).

If one of several, jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all (*k*). Abandonment is necessary to make a constructive total loss; but if there be an actual loss, the circumstance of the assured having previously given an ineffectual notice of abandonment will not prejudice his claim (*l*). Where a ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool, at the current rate of freight, to be paid at one month from the discharge of her cargo at Liverpool; and the shipowners effected a valued policy on the freight at and from Jamaica, to her port of discharge in the United Kingdom; and the ship arrived at Jamaica, and, after taking on board one-half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped: it was held, that the assured were entitled to recover, as for a total loss (*m*).

It may be collected, from the two following cases, under what circumstances the assured may elect to abandon and claim as for a total loss. A ship was freighted with fish, and was insured on a voyage from Newfoundland to the port of discharge in Portugal or Spain, without the Straits, or England. During the voyage a violent storm arose, in consequence of which it became necessary that part of the cargo should be thrown overboard, and the ship was so much disabled as to render it necessary for her to go into port to refit; but before she could reach any port, she was captured by the French, who took out nearly the whole of the crew and sent them into France. The ship having remained eight days in possession of the enemy, but not having been carried into port, nor within the enemy's fleet, was recaptured and brought into Milford

(*f*) *Benson v. Chapman*, 8 C. B. 950; 2 H. L. Cas. 696.

(*g*) *Stuart v. Greenock Mar. Ins. Comp.*, 2 H. L. Cas. 159. See also *Scottish Mar. Ins. Comp. v. Turner*, 4 H. L. Cas. 312.

(*h*) *Miller v. Woodfall*, 27 L. J., Q. B. 126.

(*i*) *Cammell v. Sewell*, 27 L. J., Exch. 447.

(*k*) *Hunt v. Royal Exch. Ass. Comp.*, 5 M. & S. 47.

(*l*) *Mellish v. Andrews*, 15 East, 13.

(*m*) *Davidson v. Willasey*, 1 M. & S. 313.

Haven. The assured immediately gave notice of their intention to abandon. The remainder of the cargo was spoiled whilst the ship lay at Milford Haven, and before she could be refitted. It was held, that the loss being in its nature a total loss, at the time when it happened, the assured had a right of election to abandon; that the subsequent title to restitution arising from the recapture of the ship, *which was not in a situation to pursue her voyage*, could not take away a right vested in the assured at the time of the capture; and consequently that the assured, having given immediate notice of abandonment, were entitled to recover against the insurers for a total loss (n). A ship and goods were insured for a voyage from Montserrat to London. The ship was taken by an enemy, who took out all the crew, part of the cargo, (which consisted of sugars,) and the rigging. She was afterwards recaptured, and carried into New York, where the captain arrived on the 23rd of June, and taking possession of her, found that part of what had been left of the cargo had been washed overboard; that fifty-seven hogsheads of what remained were damaged; and that the ship was in such a state that she could not be repaired without unloading her entirely. The owners had not any storehouses at New York, where the sugars could have been deposited while the ship was repairing, nor any agent there to advise the captain. No sailors were to be had. There was an embargo on all vessels at New York until the 27th of December, and by the destination of the ship she was to have arrived at London in July. Thus circumstanced, the captain sold the cargo, and contracted for the sale of the ship, conceiving that he was thereby acting most beneficially for his employers. The captain did not know of the insurance. The assured, upon receiving intelligence of what the captain had done, offered to abandon to the underwriters, and made a demand as for a total loss. An action having been brought to enforce this demand, it was held, that the assured were entitled to recover as for a total loss: Lord *Mansfield*, C. J., observing, that it had been laid down, "that if the voyage was lost, or not worth pursuing, if the salvage was high, if further expense was necessary, if the insurers would not at all events undertake to pay that expense, &c., the insured might abandon, notwithstanding a recapture" (o).

The preceding cases were cases of peculiar circumstances, so that it ought not to be inferred from them, that in the case of a mere capture, followed by a recapture, the insured may, *after* the recapture (p) abandon, and demand as for a total loss. The impropriety of making such an inference will appear

(n) *Goss v. Withers*, 2 Burr. 683.

(o) *Milles v. Fletcher*, 1 Doug. 230; and see *Young v. Turing*, 2 M. & Gr. 593; 2 Scott's N. R. 752.

(p) The assured, upon intelligence of a capture, may abandon, and claim as for

a total loss. Admitted *per* Lord *Kenyon*, C. J., in *M' Masters v. Schoolbred*, 1 Esp. N. P. C. 237; but if they neglect this opportunity, and afterwards the ship is recovered, the assured can only claim for the loss actually sustained. *S. C.*

from the following case :—A ship, valued at a certain sum, was insured on a voyage from Virginia or Maryland to London ; during the voyage the ship was captured by the French, who took out nearly the whole of the crew, and put in a prize-master to carry her to France. Having remained seventeen days in possession of the enemy, she was recaptured by an English man-of-war, and carried into Plymouth, whence she was brought into the port of London, by the order of the owners of the cargo and the recaptors. The assured, having received intelligence of what had happened, gave notice to the underwriters of his intention to abandon. It appeared, that no damage had been sustained from the capture, except what arose from the temporary interruption of the voyage, and a charge for salvage, which the underwriter had offered to pay. The cargo had been delivered to the freighters, who had paid freight for the same. An action having been brought, in which the assured claimed as for a total loss ; it was held, that in cases of insurance, the plaintiff's demand is for an indemnity, consequently his action must be founded upon the nature of the injury sustained at the time of action brought ; that, as it was repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event had decided that the real injury was an average loss only, the plaintiff in the present case was entitled to recover for an average loss only (*q*).

A later decision on this subject, and which was admitted to be new in specie, must not pass unnoticed. The defendant had subscribed two policies, one on ship, and the other on freight of the same ship, on a voyage from Liverpool to Jamaica. The ship was captured on the 21st of September, and recaptured on the 25th ; after which, the plaintiff having received intelligence on the 30th of the capture, but not of the recapture, gave notice of abandonment on the 1st of October, which he persevered in after the 6th, when news of the recapture arrived, and that the ship was safe in a port in Ireland, but which notice the underwriters did not accept. And it appeared, that instead of a total loss, there had been only a small partial loss of 13*l.* and a fraction, for salvage and charges on the policy on freight, and 15*l.* and a fraction on the ship and policy, and that no damage whatever was sustained by the ship whilst in the possession of the enemy. The question was, whether that, which in the result turned out to be only a partial loss to a trifling extent, should, because of the notice of abandonment given when a total loss appeared to exist, be recovered as a total loss. The court were of opinion that they must look to the real nature of the contract in a policy of insurance, which was nothing more than a contract of indemnity ; and consequently, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss had been incurred in the salvage,

that was the real amount of the indemnification which the plaintiff was entitled to receive under this contract of indemnity (*r*). Lord *Ellenborough* observed, "that it has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events: but that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts which turn out to be true, the assured has put himself in a condition to insist upon his abandonment; but it is not enough that it was properly made upon facts, which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bonâ fide* credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a forgery; and yet, clearly no right of action would vest in him, founded upon an abandonment made upon false intelligence, and without anything, in fact, to warrant the giving of such notice. What is an abandonment more than this,—that the assured, having had notice of circumstances, which, if true, entitle him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as he can? But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity? And if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act (the recapture) which saves the thing insured from sustaining a total loss, the whole foundation of the abandonment fails." So where upon an insurance on ship from Rio de Janeiro to Liverpool, the ship was captured, and afterwards recaptured: but in the interval the assured, having received intelligence of the capture, gave notice of abandonment, and after the recapture the ship arrived at Liverpool, having sustained a partial damage: it was held, that the abandonment was not binding, and that the assured could recover for a partial loss only (*s*).

The loss of the voyage, occasioned by the detention of the ship, will not enable the owner to recover upon a policy on the ship as for a total loss, the ship having been released before abandonment (*t*). "The principle," said Lord *Campbell*, "laid down in the cases is, that if there be once a total loss by capture, it will still continue to be a total loss, unless something afterwards occurs by which the

(*r*) *Bainbridge v. Neilson*, 10 East, 329.

(*s*) *Brotherston v. Barber*, 5 M. & S. 418.

(*t*) *Parsons v. Scott*, 2 Taunt. 363.

assured either has the property restored to him, or the means of obtaining its restoration" (u). Where the ship was wrecked, but all the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: it was held, that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss, by a notice of abandonment (x). "As a general rule, when the whole or any part of the cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor the assured recover as for a total loss" (y). The Court of Common Pleas also held, in that case, that in determining whether it were *practicable* to send on the cargo, the jury were bound to take into consideration the following items:—1. The cost of unshipping the cargo; 2. Of drying and warehousing it; 3. Of transshipping it; 4. Of sending it on (if it could not be forwarded on other terms) at a higher than the original rate of freight; 5. The amount of salvage allowed in proportion to the value of the cargo saved. If the total of these items exceeded the selling value of the cargo at the port of discharge, then the loss would be total, otherwise only average. Policy of assurance on goods (copper and iron) at and from London to Quebec, warranted free of particular average, and the ship, owing to sea damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the goods were damaged, and the repairs detained her so long as to prevent her reaching Quebec that season, and no other ship could be procured at that or a neighbouring port, to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage; it was held, that this was not a total loss of the goods, and that the assured could not abandon (z).

A vessel was stranded and frozen up in the St. Lawrence, in the beginning of the winter, and on the breaking up of the ice, in the spring, she was found to be in imminent peril, and after several surveys, both ship and cargo were sold, under circumstances which the jury found to constitute a reasonable necessity for an immediate sale; the expense of getting the ship afloat and repairing her, and of forwarding the cargo (timber) to its destination (Liverpool), being greater than their value when so respectively repaired and carried, it was held, in the Common Pleas, that the underwriters on cargo were liable as for a total loss, without notice of abandonment: the information of the loss and of the sale having

(u) *Dean v. Hornby*, 23 L. J., Q. B. 132.

(x) *Thompson v. Royal Exch. Ass. Comp.*, 16 East, 214; see also *Navone v. Haddon*, 9 C. B. 36; 19 L. J., C. P. 164.

(y) *Per Jervis*, C. J., delivering the judgment of the Court of Common Pleas in *Rosetto v. Gurney*, 11 C. B. 188;

20 L. J., C. P. 257, and in which case that court declined to adopt to its full extent the judgment of the Exchequer in *Reimer v. Ringrose*, 6 Exch. 263.

(z) *Anderson v. Wallis*, 2 M. & S. 240, recognized in *Everth v. Smith*, 2 M. & S. 278, and in *Hunt v. Royal Exch. Ass. Comp.*, 5 M. & S. 47.

both reached the assured at the same time (*a*). This judgment was, however, reversed by the Exchequer Chamber, which, without determining the question as to whether a notice of abandonment was necessary or not, held, that in accordance with the principle laid down in *Rosetto v. Gurney*, the jury ought not, in considering whether it was practicable to forward the cargo, to have taken into account, as they had, the whole of the cost of transit from the place of distress to the place of destination, but only the excess of that cost above that which would have been incurred if no peril had intervened (*b*).

A loss of voyage for the season by perils of the sea, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding in the voyage (*c*). Insurance on ship. The ship, during her voyage, while loading her homeward cargo, was seized by the crew and carried away to a distant country and her cargo plundered, and the ship deserted, but was afterwards retaken by another ship, and was brought with a small remaining part of her cargo to an English port (not the port of her destination), and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expense in providing a crew and stores: it was held, that this was not a total loss so as to entitle the assured to abandon after notice of the recapture (*d*). "As to *Goss v. Withers*" (*e*), said Lord *Ellenborough*, "there may be some doubt whether it is similar to the present case, and I must say that there is a looseness and generality in the expressions which have been borrowed in argument from that case and the case of *Hamilton v. Mendes*" (*f*), which make me inclined to pause upon them. What has the loss of the voyage to do with the loss of the ship? On this subject there is so much good sense in the judgment of Chief Justice *Willes*, in *Pole v. Fitzgerald*, that it may be of great use to resort to it to purify the mind from these generalities" (*g*).

Where a ship with cargo was barratrously taken out of her course by the crew, and the ship and part of her cargo sold, and the remainder sent home by another vessel; it was held, that this was a total loss of the cargo from the time of the committing of the act of barratry (*h*). Upon a hostile embargo in a foreign port, the ship-owner, who had separately insured ship and freight, abandoned them to the respective underwriters at the same time; the abandonment was accepted by the underwriters; afterwards the

(*a*) *Farnworth v. Hyde*, 18 C. B. 835.

(*b*) *Farnworth v. Hyde*, L. R., 2 C. P. 204.

(*c*) *Hunt v. Royal Exch. Ass. Comp.*, 5 M. & S. 47.

(*d*) *Falkner v. Ritchie*, 2 M. & S.

290.

(*e*) 2 Burr. 683, *ante*, p. 912.

(*f*) 2 Burr. 1198, *ante*, p. 913.

(*g*) *Willes*, 641.

(*h*) *Dixon v. Reid*, 5 B. & A. 597.

embargo was taken off, and the ship completed her voyage and earned freight. The freight having been paid by the freighters to the underwriters on the ship, the shipowner, the assured brought an action against one of the underwriters on freight, claiming as for a total loss; it was held, that the assured could not recover, the freight not having been in fact earned: or supposing it to have been in any other sense lost to the assured, by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment, with which, and the consequences thereof, the underwriters on freight had not any concern (*i*). Policy on fruit from Cadiz to London, with the usual memorandum. —In the course of the voyage the fruit was so much damaged by the sea water that it became rotten and stunk, and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on her voyage, was sold, and the cargo necessarily thrown overboard. It was held, on a case reserved, that the assured were entitled to recover for a total loss; and *Chambre, J.*, said, "the ship is expressed to have been so much damaged that she could not proceed, but was sold; now this must certainly have made a complete end of the voyage. We do not construe special cases so strictly as we do special verdicts; on the whole, therefore, it seems to me that the loss was total, and though the cargo might be said to exist in specie, yet in value it did not exist at all. If that be so, the inference of law is plain. What is it against which the underwriters protect themselves by the memorandum? Against partial damage. For what reason? Because, as the commodities enumerated are perishable in their nature, it might be impossible to ascertain with exactness, what part of the loss arose from the nature of the commodity, and what from sea damage. If ever there was a case of total loss, it certainly is the present" (*j*).

After satisfaction made as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he has paid (*k*). A shipowner having chartered his ship to J. S., insured the ship and freight with different sets of underwriters. Having notice of an embargo laid on the ship in a foreign port, he abandoned the ship and freight to the respective underwriters, and received the whole amount of their subscriptions as for a total loss; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it: and afterwards undertaking, by a similar memorandum on the freight policy, to assign to the underwriters on freight all right of recovery,

(*i*) *M'Carthy v. Abel*, 5 East, 388.

(*k*) *Randal v. Cockran*, 1 Ves. 98.

(*j*) *Dyson v. Rowcroft*, 3 B. & P. 478.

compensation, &c. The ship having been afterwards liberated, returned home, and earned freight, which was received by the assured; it was held, that however the question of priority as to the title to the freight might have been, as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate in favour of the underwriters on the ship, yet that the assured, who had received the freight, was at all events liable on his express undertaking to pay it over to the underwriters on freight (*l*). But in a subsequent case which arose on the same embargo; it was held, that although the underwriter on freight was entitled to recover the freight received by the assured, yet the assured might deduct out of it the following expenses:—1. The expenses of the ship and crew in the foreign port, including port-charges (besides the expenses of shipping the cargo, which exclusively belonged to the underwriters on freight). 2. Insurance thereon. 3. Wages and provisions of crew, from their liberation in the foreign port till their discharge here. 4. Wages, (provisions were supplied by the foreign government,) to the crew during their detention. But it was further held, that the assured was not entitled to deduct out of such freight:—1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home (*m*).

Where the subject-matter of the insurance is at first of the value mentioned in the policy, and there is not any imputation of fraud, the underwriter will be bound, in case of a loss, by the valuation in the policy, although the loss happens at the latter end of the voyage, at which time the property insured is considerably diminished in value; as where an insurance was made on ship stores and provisions, valued, on a certain voyage, and the ship foundered on the arrival at the port of discharge; it was held, that the loss being total, and no fraud, the underwriter was liable to pay the value inserted in the policy, although it appeared that the provisions to the amount of half that value had been expended (*n*). "Valuation at the sum insured is an estoppel in case of a total loss" (*o*).

The wages and provisions of the crew of a ship during its detention, for the purpose of repairing damages sustained by perils of the sea, are not chargeable to the underwriters of a policy on the ship (*p*). Where two ships, A. and B., come into collision, and both sustain damage, but ship A. having sustained less damage than ship

(*l*) *Thompson v. Rowcroft*, 4 East, 34. See also *Leatham v. Terry*, 3 B. & P. 479. As to abandonment of freight, see *Case v. Davidson* (*in error*), 2 B. & B. 379, and *Green v. Royal Exch. Ass. Comp.*, 6 Taunt. 68.

(*m*) *Sharp v. Gladstone*, 7 East. 24.

(*n*) *Sharpe v. Felton*, 2 East, 109.

(*o*) *Per Lee*, C. J., in *Erasmus v. Bank*, M. 21 Geo. II., and *Smith v. Fleazney*, Dec. 13, 1747; and see *Irving v. Manning*, 1 H. L. Cas. 817.

(*p*) *Devarux v. Salvador*, 6 Nev. & M. 713.

B., the owners of A. were compelled to pay a sum of money to the owners of ship B. so as to equalize the loss sustained by each ; it was held, that the sum so paid was not a loss recoverable under a policy on the ship A., although the accident occurred under circumstances, that the loss, by the direct damage, sustained by the ship A. was recoverable (q).

An action upon a valued policy : the defendant paid into court 30*l.* per cent. It was held, that this was merely an admission that a loss of 30*l.* per cent. had been sustained, and no more (r). Where there is not any valuation in the policy, the prime cost or invoice price, together with all charges until the goods are put on board, and the premium of insurance, will be the foundation upon which the loss will be computed. If part of a cargo, capable of distinct valuation, be lost, the value of such part must be paid (s). When there is an insurance on goods, as may be thereafter declared and valued, the assured may, by duly declaring and valuing before the loss, make it a valued policy : but if the assured do not so declare and value, it is then an open policy, and the interest must be proved at the trial.

VI. Of Partial Losses.

A partial loss upon a ship or goods is such a proportion of the prime cost as is equal to the diminution in value occasioned by the damage (t). In a case of a partial loss upon goods, by sea damage, the rule is, that the underwriter is not to be subjected to the fluctuations of the market, and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination (u). Hence, in computing the average in a case of this kind, the difference between the respective gross proceeds (x) of the damaged goods, and of the goods if they had arrived sound at the port of delivery, must first be ascertained. Then, whatever aliquot part of the gross proceeds of the sound commodity at the port of delivery such difference constitutes, the same aliquot part of the original value will be the sum for which the underwriter will be liable : *e. g.* suppose a hogshead of sugar is insured on a voyage from London to Hamburgh, the original value is 30*l.* ; being deteriorated by sea damage, the gross proceeds at Hamburgh amount to 40*l.* ; whereas, if the sugar had not been damaged, the gross proceeds would have amounted to 50*l.* The difference is 10*l.*, or

(q) *Devaux v. Salvador*, 6 Nev. & M. 713.

(r) *Rucker v. Palsgrave*, 1 Taunt. 419.

(s) *Per Lord Ellenborough*, C. J., *Harman v. Kingston*, 3 Campb. 152.

(t) *Marsh*. 535.

(u) *Lewis v. Rucker*, 2 Burr. 1167.

(x) *Johnson v. Sheddon*, 2 East, 581 ; *Hurry v. Royal Exch. Ass. Comp.*, 2 B. & P. 308.

one-fifth part of 50*l*. The sum, then, which the underwriter must pay will be one-fifth of 30*l*., the original value, or 6*l*. In cases where the sums are more complicated than in the preceding instance, the calculation may be made as follows: as the gross proceeds of the sound : the gross proceeds of the damaged : : the original value : a fourth quantity, which being found by the rule of three, must be subtracted from the prime cost, and the difference will be the average loss or sum for which the underwriter is chargeable. The proportion of loss is calculated through the same medium, (that is, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery,) whether the policy be valued (*y*) or open (*z*). But the proportion of loss, when ascertained, is applied to different standards of value. For the original value in the case of a valued policy is the valuation in the policy (*a*); but in the case of an open policy, the original value is the invoice price at the port of delivery, including premiums of insurance and commission (*b*).

A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas, for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port: it was held, firstly, that such desertion of the crew did not of itself amount to a total loss: and secondly, that the ship having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they were not entitled to abandon, and that there was only a partial loss (*c*). In an action on a policy on ship and goods, warranted free from American condemnation, it appeared, that the ship and goods were damaged by the perils of the sea, and were afterwards seized by the American government, and condemned. It was held, that the total loss by subsequent seizure and condemnation took away from the assured the right to recover in respect to the previous partial loss by sea damage: inasmuch as the immediately operating cause of total loss was one from which, and its consequences, the underwriter was by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff: and as there never existed a period of time prior to the total loss, in which the assured could have practically called on the underwriter for an indemnity against the temporary and partial injury (*d*).

(*y*) *Lewis v. Rucker*, 2 Burr. 1167.

(*z*) *Usher v. Noble*, 12 East, 639.

(*a*) *Irving v. Manning*, 1 H. L. Cas. 817.

(*b*) See, on this subject, *Winter v. Haldimand*, 2 B. & Ad. 650, where it is

doubted whether the payment on the shipment of goods can be added to their price, so as to form part of their value in an open policy.

(*c*) *Thornely v. Hebson*, 2 B. & A. 513.

(*d*) *Livie v. Janson*, 12 East, 648.

The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended and labour bestowed about the defence, safeguard, and recovery of the ship, to a much greater amount than the subscription; and it shall be recoverable as an average loss (*e*). Upon a policy on hogsheads of sugar, warranted against particular average, some part of the sugar in every hogshead being preserved, though less than three per cent. on the cargo; it was held (*f*), that this could not be a total loss. Where an insurance was effected on wheat shipped in bulk, and valued at 1600*l.*, free from average, except general, or the ship were stranded, and the ship having sprung a leak, part of the wheat, value 75*l.*, was pumped out with the water and lost: it was held, that the insured could not recover as for a total loss of a part; the court observing, that "Where the insurance is on each package separately, it is to be treated as a total loss upon each package lost; but where it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no *average* loss; and there cannot in such a case be any *total* loss of a portion only of the cargo (*g*). On the memorandum "free from average under 3*l.* per cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3*l.* per cent., but amounting together to more (*h*).

VII. Of Adjustment.

The adjustment of a loss is the settling and ascertaining the amount of the indemnity which the assured, after all allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay (*i*). An adjustment being indorsed on the policy, and signed by the underwriter, with a promise to pay in a given time, is to be considered as a note of hand (*j*), but it does not require a stamp (*k*). The adjustment is only *prima facie*, and not conclusive evidence against the underwriter (*l*). Hence, where a witness who proved the adjustment, swore that soon after the underwriters had signed it, doubts arose in their minds as to the honesty of the transaction, Lord Kenyon, C. J., was of opinion, that in such case the plaintiff

(*e*) *Le Cheminant v. Pearson*, 4 Taunt. 367.

(*f*) *Hedburg v. Pearson*, 7 Taunt. 154.

(*g*) *Hills v. London Ass. Comp.*, 5 M. & W. 569. See *Ralli v. Johnson*, 6 E. & B. 422; 25 L. J. Q. B. 300; and *Duff v. Mackenzie*, 26 L. J. C. P. 313; 3 C. B. N. S. 16, *ante*, p. 908.

(*h*) *Blackett v. Royal Exch. Ass. Comp.*,

2 Cr. & J. 244; 2 Tyrw. 266.

(*i*) Marsh. 499.

(*j*) *Hog v. Gouldney*, Beawes, 310, Lee, C. J.

(*k*) *Per Kenyon*, C. J., in *Wiebe v. Simpson*, London Sittings after M. T. 41 Geo. III., MSS.

(*l*) *Per Kenyon*, C. J., in *Rodgers v. Maylor*, Park, 267.

should produce other evidence ; and that shutting the door against inquiry, after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters. The court afterwards, on a motion for a new trial, concurred in opinion with the chief justice (*m*). The production of the policy by the assured, with the adjustment on it and the name of the defendant struck off, does not prove payment of the sum adjusted ; for it frequently happens, that the name is struck off, on the face of an adjustment, where nothing is paid, but an arrangement made to pay at a future time (*n*). Lord *Ellenborough*, expressed a clear opinion (*o*), that an adjustment is merely an admission on the supposition of the truth of certain facts stated, that the assured are entitled to recover ; and although it is incumbent on an underwriter who has once admitted his liability by an adjustment to make out a strong case, yet, until actual payment of the money, he may avail himself of any defence which either the facts or the law of the case will furnish. In *Shepherd v. Chewter*, 1 Campb. 274, it was held, that an adjustment was not binding, although the underwriter, at the time of signing it, had an opportunity of becoming acquainted with the history of the voyage, and the circumstances attending the loss, his attention not having been drawn to the fact which discharged his liability to the assured ; Lord *Ellenborough*, C. J., observing, that the adjustment was *prima facie* evidence against the defendant, but it certainly did not bind him, *unless there was a full disclosure of the circumstances of the case : unless they were all blazoned to him as they really existed.* And see Lord Campbell's note on this case, in which he has shown, that, upon principles of law, a mere adjustment is not in any case or under any circumstances conclusive, but that the utmost effect which can be given to it, is to transfer the burthen of proof from the assured to the underwriters.

A ship was insured, warranted free of capture, in port. A letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted ; the former returned, and the latter received back the premium. It afterwards appeared the capture was not in port ; it was held, that the assured was not precluded by the adjustment and repayment from recovering on the policy (*p*), whether the underwriter's name had been struck off the adjustment only or the policy also (*q*). An underwriter has never been considered discharged as against the assured until his name has been struck off the policy (*r*), with the consent of the assured (*s*). An usage at Lloyd's does not bind a person not cognizant of

(*m*) *De Garron v. Galbraith*, Park, 194 ; Peake's Additional Cases, 37, S. C.

(*n*) *Adams v. Sanders*, M. & Malk. 373, Lord Tenterden, C. J.

(*o*) *Herbert v. Champion*, 1 Campb. 134.

(*p*) *Reyner v. Hall*, 4 Taunt. 725.

(*q*) *Ibid.*

(*r*) *Russell v. Bangley* 4 B. & A. 395.

(*s*) *Bartlett v. Pentland*, 10 B. & C. 760.

it (t). The effect of an adjustment was thus stated by *Jervis*, C. J., in a recent case:—"An adjustment has not the effect of determining absolutely the amount due, so as to dispense with the intervention of a jury; it is an instrument or means by which a jury may be led to the conclusion that the amount adjusted is the real amount of unliquidated damages for which they are to give their verdict. It is only a means for enabling the jury to fix the amount for which the plaintiff sues in the shape of unliquidated damages, and not an amount binding upon the parties in all events" (u). In *Scott v. Irving*, 1 B. & Ad. 605, where the name had been struck off the policy, but without the consent of the assured; the court held the underwriter liable, and disallowed a set-off between broker and underwriter as against the assured. A trustee suing as a plaintiff in a court of law must be treated in all respects as a party to the cause; and any defence against him is a defence in that action against the *cestui que trust*, who uses his name. And therefore, where a broker in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy; and the proof was, that after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them; it was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants, and, therefore, an answer to the action (v).

VIII. *Of the Remedy by Action for Breach of the Contract of Insurance, and herein of the—*

Declaration, p. 924.

Pleas, p. 926.

Consolidation Rule, p. 927.

The usual remedy or form of action against the insurers or underwriters, to recover a loss upon a policy of insurance, is an action of assumpsit, founded upon the express special undertaking of the insurers who have signed the policy. Two counts upon the same policy are not allowed. But a count upon a policy, and a count for money had and received to recover back the premium upon a contract implied by law, are allowed. R. G., H. T., 4 Will. IV., No. 5. The two insurance companies, namely, the Royal Exchange and the London Assurance, having been, in consequence of stat. 6 Geo. I. c. 18, incorporated by several charters granted, and having a common seal affixed to all their contracts, the pro-

(t) *Gabay v. Lloyd*, 3 B. & C. 793,
recognized by *Bayley, J.*, in *Bartlett v.*
Pentland, 10 B. & C. 767.

(u) *Luckie v. Bushby*, 22 L. J., C. P.
220; 13 C. B. 864.

(v) *Gibson v. Winter*, 5 B. & Ad. 96.

ceedings against these companies must be by action of covenant or debt (*x*). And so with respect to other insurance companies incorporated since 5 Geo. IV. c. 114 (*y*). Where, however, these make use of policies not under seal, assumpsit lies (*z*).

The policy must be stated in the declaration, and it must be alleged that it was signed or subscribed with the name of the insurer against whom the action is brought; that in consideration that the assured had paid to the defendant the premium, the defendant had undertaken to indemnify the assured against the losses specified in the policy; that the goods, wares and merchandizes were laden on board the ship to the amount of £—, (*i. e.* the value insured); and further it must be alleged, that the plaintiffs were interested therein, unless the insurance be on a foreign ship, in which case an averment of interest is not necessary. The declaration must then proceed to state, that the property insured was lost, and by what means it was lost, so as to bring the case within some or one of the perils specified in the policy, and thereby intended to be insured against; as, by the barratry of the master or mariners, &c. (*a*).

It is necessary to show who are the real contracting parties, and to describe truly the interest on which the policy is effected. Therefore, if A. and B., jointly interested in a ship, effect an insurance, and there be two counts, the one averring interest in A., and the other averring interest in B., the plaintiff can recover on neither count (*b*). The action upon a policy effected by a broker, may either be brought in the name of the broker immediately concerned in effecting it, or in the names of the parties interested, for whose benefit it was effected: therefore, where the plaintiffs were the parties really interested, it was held, that they were the right parties to sue, although the name of one of them only was inserted in the policy (*c*). Where the consignee of goods pledged the bill of lading with another person as security for advances made by him, and upon an agreement that the consignee should effect an insurance on the goods for the benefit of the pledgee, and deposit the policy with him; it was held, that the pledgee might sue in his own name (*d*). A person who assigns away his interest in a ship or goods after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept

(*x*) *Sunderland Marine Assurance Comp. v. Kearney*, 16 Q. B. 925; 20 L. J., Q. B. 417.

(*y*) *Benson v. Chapman*, 6 M. & Gr. 792; *Milward v. Hibbert*, 3 Q. B. 120.

(*z*) *Ashley v. Pratt*, 16 M. & W. 471.

(*a*) *Sutherland v. Pratt*, 11 M. & W.

296.

(*b*) *Cohen v. Hannam*, 5 Taunt. 101.

(*c*) *Sunderland Marine Assurance Comp. v. Kearney*, 16 Q. B. 925; 20 L. J., Q. B. 417.

(*d*) *Sutherland v. Pratt*, 12 M. & W. 16; see also *Hastie v. Couturier*, 9 Exch. 109; 5 H. L. Cas. 673.

alive for his benefit (e). By the new pleading rules, Hil. Term, 1853, Rule 9, "in actions on policies of assurance the interest of the assured may be averred thus:—That A., B., C. and D. [*or some or one of them*] were or was interested, &c. And it may also be averred, that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

If the plaintiff should allege in the declaration, that there was a total loss, and lay his damages accordingly, evidence of a partial loss will maintain the declaration, and plaintiff may recover the amount of his real loss (f). Double insurance is, where there are two insurances made by the same person on the same risk, whereby the *assured* proposes to receive the said sum twice for the same loss, or, in other words, a double satisfaction. The policy of the law, however, will permit the recovery of a single satisfaction only. But although the assured is not entitled to two satisfactions, yet in an action upon the first policy, he may recover the whole sum insured (g). If there has been a double insurance, then it will be proper to consider against which of the underwriters (as the best man, or in the best circumstances) the action shall be brought. It is immaterial to aver interest at any day previous to the commencement of the risk. In a declaration on a policy on freight, if it be averred that the plaintiff was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards, on a subsequent day, the plaintiff acquired an interest, it will suffice (h). A change in the interest after the policy is effected, and after the loss has happened, cannot be set up as an answer by the underwriters against a claim for such loss (i). But a person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy: except as a trustee for the assignee, in a case where the policy is handed over to the assignee upon the assignment, or there is an agreement that it shall be kept alive for his benefit (j).

A person who has several interests in a cargo, *viz.* as partner in seven-sixteenths, as consignee of the whole, and as having a lien on the whole for advances, may protect them all by one insurance, without expressing in the policy the number or nature of his interests (k). Although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large. Hence, an insurance "on goods" is sufficient to

(e) *Powles v. Innes*, 11 M. & W. 10. As to right of assured to sue after bankruptcy, see *Castelli v. Boddington*, 1 E. & B. 66; (*in error*) *ibid.* 879.

(f) 2 Burr. 904; 1 Bl. R. 198.

(g) *Newby v. Read*, 1 Bl. R. 416.

(h) *Per Cur.*, *Rhind v. Wilkinson*, 2

Taunt. 242, 243.

(i) *Sparkes v. Marshall*, 2 B. N. C. 776.

(j) *Powles v. Innes*, 11 M. & W. 10.

(k) *Carruthers v. Sheddin*, 6 Taunt. 14.

cover the interest of carriers in the property under their charge (l). Joint owners of property insured for their joint use, and on their own account, cannot recover upon a count on the policy averring the interest to be in one of them only (m).

Of the Pleas.

By the Pleading Rules, Hilary Term, 1853, Rule 6,—“In all actions of simple contract the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters in fact from which the contract, promise, or agreement alleged may be implied by law, *exempli gratiâ*. In an action on a policy of insurance such pleas will operate as a denial of the subscription to the *alleged policy* (n) by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.” And by Rule 8,—“All matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gra.* unseaworthiness, misrepresentation, concealment, deviation.” By stat. 11 Geo. I. c. 30, s. 43, the “London and Royal Exchange Assurance Companies are allowed in actions of debt to plead generally, that they owned nothing to the plaintiff in such action (o); and in actions of covenant upon such policies, to plead generally, that they have not broken the covenants in such policy contained, or any of them. And if issue be joined thereupon, it shall be lawful for the jury, if they see cause, to find a verdict for the plaintiff, and to give such part only of the sum demanded, if in debt, or so much damages, if in covenant, as it shall appear to them, upon the evidence, such plaintiff ought in justice to have.” The words “by statute” must now be inserted in the margin of such plea, together with the year or years of the reign for which the act or acts of parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise; otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament (p).

By Rules 10 and 12 of the Pleading Rules, H. T. 1853, in actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded.

(l) *Crowley v. Cohen*, 3 B. & Ad. 478.

(m) *Bell v. Ansley*, 16 East, 141.

(n) See *Sutherland v. Pratt*, 11 M. & W. 296; *Dowdall v. Hallett*, 18 Q. B.

2; 21 L. J., Q. B. 98.

(o) But see Pleading Rules, Hil. Term, 1853, rule 11, abolishing the plea of “*nil debet*.”

(p) Rule 21, Trin. Term, 1853.

Consolidation Rule.

In actions upon a policy of assurance against several underwriters (*q*), the court, by consent of the plaintiff, will make a rule on the application of the defendants, which is called the consolidation rule, for staying the proceedings in all the actions except one, upon the *defendants* undertaking to be bound by the verdict in that action, and to pay the amount of their several subscriptions and costs, in case a verdict shall be given therein for the plaintiff. This rule, though attempted before without success, was introduced by Lord *Mansfield* into general use, to avoid the expense and delay arising from the trial of a multiplicity of actions upon the same question: and if the plaintiff will not give his consent, the court have the power of granting imparlances in all the actions but one, till the plaintiff has an opportunity of proceeding to trial in that action. On the other hand, if the plaintiff consent to the rule, the court will make the defendant submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error. A number of actions against different underwriters were ordered to be consolidated, notwithstanding the owners of the goods on which the policies were effected had subsequently become bankrupt, and that their interest in one of the policies had been assigned prior to the bankruptcy, and that there was a question in each of the actions as to whether there was a right to set off premiums against losses (*r*). It was formerly supposed that the plaintiff as well as the defendant was bound by the consolidation rule; but in *Doyle v. Stewart*, 4 Nev. & M. 873, the contrary was held, Lord *Denman*, C. J., observing, "that the principle of the consolidation rule had always been, that as the defendants asked for a *favour*, they might reasonably be required to pay the price of it. It may be that in this case the consolidation rule would benefit the plaintiff, but we cannot compel a party to accept a benefit for which he does not ask" (*s*).

By R. G., H. T., 1853, Rule 13, where money is paid into court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court.

Two actions having been brought by the same plaintiff against different defendants, on the same policy, the court consolidated them after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected (*t*).

(*q*) Tidd's Prac. 635 (7th edit.).

(*r*) *Syers v. Pickersgill*, 6 Week. Rep.

16.

(*s*) And see *per Parke, B.*, in *Mac-*

gregor v. Horsfall, 4 M. & W. 321.

(*t*) *Hollingsworth v. Brodrick*, *Hollingsworth v. Collinson*, 4 A. & E. 646.

IX. *Of the several Grounds of Defence on which the insurer may insist.*

1. *Alien Enemy*, p. 928.
2. *Illegal Voyage or Illegal Commerce*, p. 928.
3. *Misrepresentation, Concealment, Suppression*, p. 932.
4. *Breach of Warranty*, p. 936.

Express :—

1. *Time of Sailing*, p. 937.
2. *Safety of a Ship at a particular Time*, p. 939.
3. *To depart with Convoy*, p. 940.
4. *Neutral Property*, p. 942.
5. *Capture in Port*, p. 946.

Implied :—

1. *Not to deviate*, p. 946.
2. *Seaworthiness*, p. 952.
5. *Re-assurance*, p. 954.
6. *Wager Policy*, p. 955.

1. *Alien Enemy.*

If the parties interested in the insurance become alien enemies before the loss happens, this may be *pleaded* to an action brought in the name of the British agent who effected the insurance (*u*). But where parties interested became alien enemies after the loss happened, though before action commenced; it was held, that the British agent, who effected the insurance, might recover against the underwriter, who had only pleaded the general issue (*v*); now such a defence must in all cases be pleaded specially (*x*). Where the plaintiff becomes an alien after the commencement of the suit the defence must be pleaded *puis darrein continuance* (*y*). A plea stating, that plaintiff was born out of the legiance of the king, and that the persons exercising the powers of government in the country where he was born are enemies of the king, is not good. It ought to state that the plaintiff *himself* is an enemy (*z*).

2. *Illegal Voyage or Illegal Commerce.*

Another ground of defence is, that the voyage insured was prohibited by law (*a*), or that the goods insured were intended for carrying on an illegal commerce. In neither of these cases can an action be supported against the underwriter for non-performance of the contract of insurance. The circumstance of the underwriter

(*u*) *Brandon v. Nesbitt*, 6 T. R. 23.

(*v*) *Flindt v. Waters*, 15 East, 260.

(*x*) *Ante*, p. 925.

(*y*) *Alcinous v. Nigren*, 4 E. & B. 217 ;
24 L. J., Q. B. 19.

(*z*) *Casseres v. Bell*, Feb. 8, 1799, B.

R., L. P. B. 264; *Dampier*, MSS. L.
I. L.

(*a*) The principal act now in force for regulating the navigation of the United Kingdom is the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

having been apprized of the illegality of the voyage or trade is wholly immaterial: but, in order to render the insurance illegal, it is necessary that the illegality should exist *during the course of the voyage insured*. Hence, a policy on goods purchased with the proceeds of an illegal cargo is binding (b); and, in like manner, the assured may recover on a policy, although the ship, in a prior voyage, had been guilty of some transgression for which she was liable to be seized (c). Trading with an enemy without the king's licence, being illegal, the law will not enforce a contract of insurance made for the protection of such trade (d). But it is legal to trade with the subjects of an enemy's country by the king's licence (e). If it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond having been given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing until after that time. But if the adventure licensed be *bond fide* prosecuted within a part of the time limited, it will not become illegal because, by some accident, the voyage was protracted beyond that period (f). Whenever the crown, for purposes of state policy and public advantage, licenses a description of trading with an enemy's country which would otherwise be unquestionably illegal, such commerce must be regarded by all the subjects of the realm, and by the courts of law, as legal, with all the consequences of its being legal; one of which consequences is a right to contract with other subjects of the country for the protection of such property in the course of its conveyance to its licensed place of destination, through an enemy's country, and for the purpose of being there delivered to an alien enemy as consignee or purchaser (g).

A., a Spaniard by birth, who had been domiciled as a merchant in England for several years, having purchased and shipped goods in a neutral vessel, on account of a correspondent, a native of, and resident in, Spain, obtained a licence from the British government for the vessel to proceed with her cargo on a voyage from an English port to a port in Spain. A. effected a policy on the goods, which was in the usual form, and stated to be made by A. "as well in his own name as in the name of any person to whom the same might appertain." The vessel, in the prosecution of the voyage, was captured by a French privateer, and carried into a port in Spain, where the vessel and cargo were condemned. At the time

(b) *Bird v. Appleton*, 8 T. R. 562.

(c) *S. C.*

(d) *Potts v. Bell*, 8 T. R. 548.

(e) *Vandyck v. Whitmore*, 1 East, 475.

(f) *Schroeder v. Vaux*, 15 East, 52.

(g) *Usparicha v. Noble*, 13 East, 332.

of the capture and condemnation, France and Spain were co-belligerent allies at war with England. A. having brought an action on the policy, averring interest in the purchaser; it was held, that A. was entitled to recover, and that the action was well brought in his name for the benefit of the purchaser; that the legal result of the licence was, that not only the plaintiff, the person licensed, might sue in respect of such licensed commerce in an English court of law, but that the commerce itself was to be regarded as legalized for all purposes of its due and effectual prosecution. That for the purpose of the licensed act of trading, (but to that extent only,) the person licensed was to be considered as virtually an adopted subject of this country, and his trading, as far as the disabilities arising out of a state of war were concerned, was British trading; that the plaintiff and the Spanish purchaser of the cargo were actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country; and that it could not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade, and which this trade in question, sanctioned as it was by his majesty's licence, must be deemed to have been (*h*).

A licence granted under an order in council to H. S., (a British resident merchant,) permitting a vessel bearing any flag, except the French, to proceed in ballast from any port north of the Scheldt to Archangel, there to load a cargo of such goods as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to H. S., or any particular class of persons: and, therefore, where Russian subjects at Archangel, who were alien enemies, had shipped goods under such licence for the purpose of being brought into this country; it was held, that they were protected by it; and that an insurance made for their benefit was legal (*i*). A licence to I. H., of London, merchant, on behalf of himself and other British or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in any vessel, bearing any flag except the French, will protect a ship trading from that port, in which ship I. H. and an alien enemy are jointly interested; and therefore such interest was held insurable (*j*). By virtue of a treaty of commerce entered into between Great Britain and the United

(*h*) *Ibid.* Although the authority of the preceding decision appears to have been doubted in *Mennett v. Bonham*, 15 East, 495, and *Flindt v. Crockatt*, 15 East, 522, yet on a review of these two cases in a court of error, the judgment of B. R. in them was reversed. See 5 Taunt. 674; *Anthony v. Moline*, 5 Taunt. 711; and *Bazett v. Meyer*, 5 Taunt. 824.

(*i*) *Robinson v. Touray*, 1 M. & S. 217; *S. P. Same v. Cheeseuright*, *ibid.* 220, recognized in *Hullman v. Whitmore*, 3 M. & S. 340. The same subject was discussed again in *Rucker v. Ansley*, B. R. Sittings at Serjeants' Inn before E. T. 56 Geo. III., 5 M. & S. 25.

(*j*) *Hagedorn v. Reid*, 1 M. & S. 567.

States of America, the citizens of the United States may carry on trade between the British territories in the East Indies and the United States, in articles not entirely prohibited. It is not necessary that this trade should be a direct and immediate trade from the United States to the British territories; it may be carried on circuitously through any country in Europe, including Great Britain.

A natural-born subject of Great Britain, admitted a citizen of the United States of America, either before or after the declaration of American independence, has been considered as a citizen of the United States, within the meaning of the above-mentioned treaty, and as such entitled to the commercial privileges thereby granted. Hence, a policy of insurance, effected by or in favour of such adopted citizen of the United States, for the protection of such circuitous trade, is valid (*k*).

A natural-born subject of this country, domiciled in a foreign country, in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled, to trade with another country in hostility with this; therefore, where plaintiff, a British-born subject domiciled in America, effected a policy of assurance on ship, freight, and goods, at and from Virginia to any ports in the Baltic, and the ship was captured in her way to *Elseneur*, in Denmark; Denmark being in amity with America, but at war with this country; it was held, that the plaintiff was entitled to recover (*l*). Although insurances upon goods, the exportation or importation of which is prohibited by the law of England, or by the law of nations, be illegal, yet where the prohibition is founded merely on the law of a foreign state, the insurance will be valid; because one nation never takes notice of the revenue laws of another (*m*). The mere circumstance of an alien residing in an enemy's country will not invalidate an insurance effected by him on goods to be delivered at a neutral or friendly port (*n*). Though a state may be in the military possession of one of two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter choose to permit a continuance of commerce with them: therefore, where an insurance was effected on property, shipped in this country, on account of persons who were domiciled at *Hamburgh*, at a time when that country was in the possession of French troops, the senate continuing to exercise the powers of civil government in the same manner as before; it was held, that the assured were entitled to recover for a loss which happened in the course of a voyage permitted by his Majesty's orders in council (*o*).

(*k*) *Wilson v. Marryat*, 8 T. R. 31, affirmed on error in the Exch. Cham., 1 B. & P. 430.

(*l*) *Bell v. Reid*, 1 M. & S. 726.

(*m*) *Planche v. Fletcher*, Doug. 250.

(*n*) *Bromley v. Hesselstine*, 1 Campb. 75.

(*o*) *Hagedorn v. Bell*, 1 M. & S. 450.

Where a particular trade is prohibited by express statute, insurances made for the protection of such trade are illegal (*p*). The owners of a vessel, who by performing the legal stipulations of a charter-party, provoke confiscation by the illegal and piratical act of a foreign state, do not thereby avoid their assurance (*q*). Trading in contravention of a proclamation, whereby an embargo is laid on, in time of war, is illegal: and consequently an insurance upon such trade, even when carried on by a neutral, is void (*r*). If a vessel brings hither from a hostile country, under a licence, a cargo of enumerated goods, and also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated (*s*). If there be an infirmity in any part of an integral voyage, it will make the whole illegal, so that the insured cannot recover upon a policy on any part of it (*t*). So if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void. A policy was effected on goods to be thereafter specified to a certain amount; by the specification it appeared that the goods consisted principally of hardware, but partly of naval stores, the exportation of which was prohibited, under pain of forfeiting the stores, treble their value, and the ship. It was held, that the exportation of the stores being illegal, all contracts for protecting the stores so exported were impliedly avoided; that the policy was one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured could not alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract (*u*).

3. *Misrepresentation, Concealment, and Suppression.*

The allegation of a falsehood (*v*), or misrepresentation, (though by mistake) (*x*), or the concealment and suppression (*y*) of the truth, *as to a fact or circumstance material to the risk*, either by the assured or his agent, is considered as a fraud on the underwriter, and consequently will vacate the policy or annul the contract from the beginning (*z*). Hence, the underwriter may avail himself of this ground of defence, even where the loss arises from a

(*p*) *Johnston v. Sutton*, Doug. 254.

(*q*) *Sewell v. Royal Exch. Ass. Comp.*, 4 Taunt. 856.

(*r*) *Delmada v. Motteux*, Park, 505.

(*s*) *Pieschell v. Allnutt*, 4 Taunt. 792. See 1 M. & S. 450.

(*t*) Admitted by Lord Kenyon, C. J., in *Wilson v. Marryat*, 8 T. R. 46, and expressly laid down by the same learned judge in his charge to the jury, in *Bird v. Pigou*, London Sitings after H. T. 40 Geo. III. B. R., MSS.

(*u*) *Parkin v. Dick*, 2 Campb. 221; 11 East, 502.

(*v*) *Skin*. 327; *Roberts v. Fonnerdau*, Park, 405.

(*x*) *Macdowall v. Fraser*, Doug. 260.

(*y*) *De Costa v. Scandret*, 2 P. Wms. 170; *Hodgson v. Richardson*, 1 Bl. R. 463; *Ratcliffe v. Shoolbred*, Park, 413; *Willes v. Glover*, 1 B. & P., N. R. 14.

(*z*) *Fitzherbert v. Mather*, 1 T. R. 12; *Elkin v. Janson*, 13 M. & W. 655.

cause wholly unconnected with the fact or circumstance misrepresented (*a*). The question of materiality is not a matter of law, but a question of fact to be decided by a jury (*b*): and the proper evidence to guide their judgment is the evidence of persons conversant with the subject-matter of the inquiry (*c*). It was held by Lord *Tenterden*, that a misrepresentation as to the cargo with which a ship was to sail on a *future* day would not suffice as a defence, unless the misrepresentation were fraudulently made (*d*); but it was subsequently decided by the House of Lords, that the misrepresentation of a future event material to the risk, avoids the policy though not fraudulent (*e*): and now it may be laid down as a rule, that the positive representation of a future event material to the risks, will, if false, avoid the policy, though it may not be actually fraudulent (*f*).

Goods were insured as the goods of a *Hamburgher*, who was an ally, and the goods, were, in fact, the goods of a *Frenchman*, who was an enemy; this was held, by *Holt*, C. J., to be a fraud (*g*). So where a letter had been received, stating that a ship sailed on the 24th of November, after which an insurance was made, and the agent of the assured told the insurer, that the ship sailed the latter end of December; this was held by *Lee*, C. J., to be a fraud (*h*). So where a ship was insured in London, on the 30th of January, on a voyage from New York to Philadelphia, and the broker represented the ship to be safe in the Delaware, on the 11th of December, whereas in fact it was lost in that river on the 9th of December; it was held, that as the representation was false in point of fact, and as it related to a material circumstance, namely, the safety of a ship at a certain time, the contract was annulled; and although it appeared that the assured, at the time, believed the representation to be true, yet the court were of opinion that this did not vary the case; for it was incumbent on the assured to make a fair and true representation, and if he represented material facts to the underwriter, without knowing the truth, he took the risk on himself (*i*). "By an extension of equitable relief, in cases of fraud," says Lord *Mansfield*, "if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material; as where having notice of a ship being lost, he says she was safe, that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the

(*a*) *Per Lee*, C. J., in *Seaman v. Fonnereau*, Str. 1183.

(*b*) *Lindenau v. Desborough*, 8 B. & C. 586; *Mackintosh v. Marshall*, 11 M. & W. 126.

(*c*) *Berthon v. Loughman*, 2 Stark. N. P. C. 258; *Rickards v. Murdock*, 10 B. & C. 540.

(*d*) *Flinn v. Tobin*, M. & M. 367.

(*e*) *Dennistoun v. Lillie*, 3 Bligh's P.

C. 202.

(*f*) Arnould on Insurance, chap. "Misrepresentation."

(*g*) Skin. 327.

(*h*) *Roberts v. Fonnereau*, London Sitings after Trin. 1742, Park, 405.

(*i*) *Macdowall v. Fraser*, Doug. 260. See also *Stewart v. Dunlop*, 4 Bro. P. C. 483, Tomlin's edit.

first (*j*). But a representation made to any underwriter, except the first, is not to be considered as made to subsequent underwriters (*k*).

The same rule holds, where the misrepresentation is made by the proper agent of the assured, although the assured be not guilty of any improper conduct; for the act of the agent binds the principal, and it will be presumed, that the principal knows whatever the agent knows (*l*). In a case where the word *expected* was used, as that the vessel insured was *expected* to sail at such a time; this was held not to amount to a representation (*m*). A representation by the owner of goods insured as to the time of the ship's sailing is matter of expectation, and if made *bond fide* does not conclude him (*n*). In effecting a policy of insurance from Russia to this country while the ship was on the outward voyage, the broker represented to the underwriters, *that a cargo was ready for her, and she was sure to be an early ship*. It was held, that this amounted only to a representation of what was *expected* on the part of the assured, and that the underwriters were liable, although, from the delay in beginning to load the cargo, the voyage home was turned from a summer to a winter risk (*o*). A representation, as it does not form any part of the written policy, requires only to be *substantially* performed. It is distinguishable in this respect from a warranty, which, being part of the policy, must be *strictly* performed. Insuring a ship by *an English name* does not amount to a warranty, or a representation, that she is *an English ship* (*p*).

A merchant having received intelligence that a ship described like his was taken, insured her, without giving any information to the insurers of what he had heard; it was held, that the concealment was a fraud on the underwriters (*q*). So where, in an action on a policy of assurance of a ship on a voyage from Lisbon to London, it appeared that the plaintiff had, on the 24th of November, received information of the ship having sailed on the 8th; it appeared also, that another vessel, which had sailed at the same time with the ship insured, had arrived in safety; after which, *viz.* on the 2nd of December, the plaintiff had effected the insurance in question, without making any disclosure to the underwriter: it was held, that there was a concealment of circumstances sufficient to avoid the policy (*r*). But where a broker, in pursuance of instructions previously received from Sunderland, effected a policy at

(*j*) *Parson v. Watson*, Cowp. 789. See also *Marsden v. Reid*, 3 East, 573.

(*k*) *Bell v. Carstairs*, 2 Campb. 543; and see *Goram v. Sweeting*, 2 Wms. Saund. 202, e.

(*l*) *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S. 35.

(*m*) *Barber v. Fletcher*, Doug. 305.

(*n*) *Bowden v. Vaughan*, 10 East, 415.

(*o*) *Hubbard v. Glover*, 3 Campb. 313.

(*p*) *Clapham v. Cologan*, 3 Campb. 382.

(*q*) *De Costa v. Scandret*, 2 P. Wms. 170.

(*r*) *M'Andrew v. Bell*, 1 Esp. N. P. C. 373.

Lloyd's at a time when a letter lay on his table at the Coal Exchange unopened, announcing the ship's loss: it was held, that the conduct of the broker did not avoid the policy (s); for he had a right to presume that he had possession of all the information on which he was to effect the policy (t). Where the plaintiffs effected a policy of assurance on wines from Oporto to London, on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto; the first of which, dated 11th of October, stated thus:—"We are loading the wines on the Stag, Captain Wheatley, who pretends to sail after to-morrow;" the other dated the 13th of October, enclosed the bills of lading, which were filled up "with convoy;" which letter the plaintiffs did not communicate to the underwriters: it was held, that it was a material concealment (u). "The reason of the rule which obliges the party to disclose, is to prevent fraud, and encourage good faith: it is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect." The question, therefore, in cases of this kind, is, "Whether there were, under all the circumstances, at the time the policy was underwritten, a fair statement, or a concealment, fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run?" (v).

Information respecting the subject-matter of warranty, either express or implied, need not be communicated to the underwriter, unless there be a specific request on his part for such information. Hence, in the case of *Shoolbred v. Nutt*, Park, 493, where the owner had received letters from his captain the day before he effected the insurance, stating that the ship had arrived at Madeira, but was very leaky, and that the pipes of wine had been half covered with water, which letters were not communicated to the underwriters; Lord *Mansfield* told the jury, "That there should be a representation of every thing relating to the risk which the underwriter has to run, except it be covered by a warranty. It is a condition, or implied warranty, in every policy, that the ship is seaworthy, and therefore there need be no representation of that.

(s) *Wake v. Atty*, 4 Taunt. 493.

(t) The nature of this work will not permit the insertion of all the cases relating to concealment. If desirous of pursuing the subject, the reader may peruse the following cases:—*Seaman v. Fonereau*, Str. 1183; *Carter v. Boehm*, 3 Burr. 1905; 1 Bl. R. 594; *Shirley v. Wilkinson*, 3 Dougl. 41; *Court v. Martineau*, 3 Doug. 161; *Webster v. Foster*, 1 Esp. N. P. C. 407; *Willes v. Glover*, 1 N. R. 14; *Little-dale v. Dixon*, 1 N. R. 151; *Freeland v. Glover*, 7 East, 457; *Lynch v. Hamilton*, 3 Taunt. 37; *Bell v. Bell*, 2 Campb. 479;

Kirby v. Smith, 1 B. & A. 672; *Weir v. Aberdeen*, 2 B. & A. 320; *Bufe v. Turner*, 6 Taunt. 338; 2 Marsh. Rep. 46; *Rickards v. Murdock*, 10 B. & C. 527; *Elton v. Larkins*, 8 Bingh. 198; 1 M. & Sc. 323; *Mackintosh v. Marshall*, 11 M. & W. 116; *Elkin v. Janson*, 13 M. & W. 659.

(u) *Bridges and others v. Hunter*, 1 M. & S. 15.

(v) *Per* Ld. *Mansfield*, C. J., in *Carter v. Boehm*, 3 Burr. 1905, cited by Lord *Ellenborough*, C. J., delivering judgment in *Haywood v. Rodgers*, 4 East, 596.

If she sail without being so, there is no valid policy. Here the leak was stopped before she sailed from Madeira, and she sailed in good condition from thence; and there is no occasion to state the condition of a ship or cargo at the end of the former voyage." Verdict for plaintiff. So where in an action on a policy of insurance upon a ship from Trinidad to London, it appeared that the assured had received a letter from his captain, informing him that he had been obliged to have a survey on the ship at Trinidad, *on account of her bad character*, but the survey, which accompanied the letter, gave the ship a good character: it was held, that the concealment of the letter and survey from the underwriter, did not vacate the policy, inasmuch as the insured impliedly warranted the ship to be seaworthy, and it did not appear that he had concealed any circumstance relative to the seaworthiness of the ship, or that at the time of effecting the policy he knew of any fact which rendered her, with reference to the risk, otherwise than seaworthy (*w*). It will be presumed that the underwriter is acquainted with the usages and circumstances of the branch of trade to which the policy relates (*x*), and consequently the assured is not bound to make a disclosure thereof; *e. g.* upon an insurance on an East India voyage, the underwriters are bound to know the course of the East India Company's charterparties and trade, and that the ship's destination is liable to be changed after the policy is effected (*y*). If the usage of the trade is general, it is immaterial for this purpose that it is not uniform (*z*).

4. Breach of Warranty.

Express :—

1. *Time of Sailing*, p. 937.
2. *Safety of a Ship at a particular Time*, p. 939.
3. *To depart with Convoy*, p. 940.
4. *Neutral Property*, p. 942.
5. *Capture in Port*, p. 946.

Implied :—

1. *Not to deviate*, p. 946.
2. *Seaworthiness*, p. 952.

Another ground of defence which may be taken by the underwriter to defeat the action, is the non-compliance with a warranty, either express or implied. Every warranty incorporated in the body of the policy, or appearing on the face of the instrument, *e. g.* in the margin (*a*), or at the bottom of the policy (*b*), or inserted in

(*w*) *Haywood v. Rodgers*, 4 East, 590.

(*x*) *Vallance v. Dewar*, 1 Campb. 503;
Ougier v. Jennings, *ibid.* 505, n.; *Kington v. Knibbs*, *ibid.* 508, n.; *Moxon v. Atkins*, 3 Campb. 200.

(*y*) *Grant v. Paxton*, 1 Taunt. 463.

(*z*) See cases in note (*x*), *supra*.

(*a*) *Bean v. Stupart*, Doug. 11; *De Hahn v. Hartley*, 1 Tr. 343.

(*b*) 3 T. R. 860.

any print or writing, which is by reference incorporated with the policy (c), must be *strictly* and *literally* complied with. "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is not any contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist, unless it be *literally* complied with" (d). In this respect it is distinguishable from a mere *representation*, which, if it be *substantially* fulfilled, it is sufficient. The most usual kinds of warranties inserted in policies, are: 1. As to the time of sailing; 2. The safety of the ship, at a particular time; 3. Departing with convoy; 4. That the thing insured is neutral property.

Express Warranty.

1. *Time of Sailing*.—This means, that the ship shall be on her voyage on the given day; for which purpose she must be completely unmoored; it will not suffice that she then had cargo and passengers on board, and was only prevented from sailing by stress of weather (e). But if a ship quits her moorings, and removes only to a short distance, being quite ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is, nevertheless, a sailing; it is otherwise, however, if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her voyage (f); and no distinction can be drawn between taking in more ballast and receiving part of the cargo (g). The word "sailing" is not confined to the mere act of hoisting the sails; the fair question in these cases is, whether, at the time of the loss, the voyage can be said to have commenced (h). A ship, which was insured *at and from Jamaica to London, warranted to have sailed on or before a particular day*, with a return of premium in case of convoy, *sailed* before the day from the port of her lading, with all her cargo and clearances on board, to the usual place of rendezvous at another part of the island, in order to join the convoy, which then lay ready, where she arrived in safety, but was detained there by an embargo *beyond* the day. It was held, that although the place of rendezvous was out of the direct course of the voyage, yet as the ship, when she sailed from the port of lading, had not any view or object but to make the best of her way to England, and as she did not go to the place of rendezvous for any purpose independent of the immediate prosecution of her voyage, the

(c) *Worsley v. Wood*, 6 T. R. 710; *Routledge v. Burrell*, 1 H. Bl. 254.

(d) *Per Lord Mansfield in De Hahn v. Hartley*, 1 T. R. 345, 346.

(e) *Nelson v. Salvador*, M. & Malk. 309.

(f) *Per Lord Tenterden, C.J., Pittegrewe v. Pringle*, 3 B. & Ad. 520, 521 *Graham*

v. Barras, 5 B. & Ad. 1011; 3 Nev. & M. 125, S. P.

(g) *Per Park, J., in Pittegrewe v. Pringle*, 3 B. & Ad. 522.

(h) *Per Denman, C.J., delivering judgment on error in Exch. Cham., Cochran v. Fisher*, 1 Cr. M. & R. 818; 5 Tyrw. 501, 502.

voyage began from the port of lading, and consequently the warranty had been complied with (*i*). A French ship was insured "at and from Guadaloupe to Havre," warranted to sail on or before a particular day. This ship took in her complete lading, and all her clearances, at Point-à-Pitre, and sailed thence before the day for Basseterre; a condition having been inserted in one of the clearances, that the ship should pass that way to take the orders of government; and the captain also expecting, in consequence of a notice which had been given by his governor, that there would be a convoy at that place. It appeared that the captain had paid an extra fee in order to procure his clearances that he might take the benefit of the convoy. The ship arrived at Basseterre two months before the day on which she was warranted, to sail, and was detained there by the governor until after the day. It was proved that Basseterre was in the direct course of the voyage. Under these circumstances, it was held, that there had been a *bonâ fide* and complete inception of the voyage, on the day the ship sailed from Point-à-Pitre, and consequently that the warranty had been complied with (*j*). Under a warranty to *depart* on or before a particular day, it is necessary not only that the ship should set sail on the voyage, but also, that she should be out of the port on or before the day (*k*). To "sail," is to sail on the voyage. To "depart," is to depart from some particular place (*l*). A policy was made subject to certain rules, one of which was, that ships were not to sail to and from any of the ports following, between the times set opposite thereto, that is to say, from any port on the east coast of Great Britain, between the 5th of October and the 5th of April, to any port in the Belts, between the 20th of December and the 15th of February. The vessel sailed on the 8th of February for F., a port in the Baltic, and was lost. It was held, that the rule amounted to a warranty, and not to an exception; and that the assured was not entitled to recover in respect of the loss; and that the word "to," as used in the rule, meant "towards" (*m*). Goods were insured at and from Demerara to London in ship or ships warranted to sail from Demerara on or before the 1st of August, 1823. Small ships take in and discharge the whole of their cargoes in the river of Demerara; but there is a shoal off the coast, about ten miles out at sea, and large ships usually discharge and take in part of their cargoes on the outside of the shoal. Goods covered by the policy were laden on board a small vessel that completed her cargo in the river; and on the 1st of August, the captain, having obtained his clearance, set sail, proceeded down the river, and about two miles out to sea, and then

(*i*) *Bond v. Nutt*, Cowp. 601.

(*j*) *Thellusson v. Fergusson*, 1 Doug. 361.

(*k*) *Moir v. The Royal Exch. Ass. Comp.*, 3 M. & S. 461.

(*l*) *Ibid.*, 6 Taunt. 245. See *Pittgreav v. Pringle*, 3 B. & Ad. 521.

(*m*) *Colledge v. Harty*, 6 Exch. 205; 20 L. J., Exch. 146.

anchored, the tide being low. On the 3rd of August he crossed the shoal, and on the 8th the vessel was lost by perils of the sea; it was held, that the vessel sailed from Demerara on the 1st of August, within the meaning of the policy (*n*). Where a licence is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage is *bonâ fide* begun before that day, it continues to be protected by the licence, though delayed beyond the day by stress of weather or other accident over which the assured have no control (*o*). So where there is a policy "*at and from*," if the ship has her cargo on board and is ready to sail before the day when the licence expires, although she is detained in port till after the day by contrary winds, the policy remains valid (*p*). Where the policy was upon a vessel "*at and from New York to Quebec*, during her stay there, thence to the United Kingdom, the said ship being *warranted to sail from Quebec on or before the 1st of November*, A. D. 1853;" it was held, that the reasonable construction was, that the warranty applied only to that part of the voyage between Quebec and England, and that the underwriter was liable in respect of loss occurring on the voyage to Quebec after the 1st of November, 1853 (*q*).

2. *Safety of a Ship at a particular Time*.—Goods were insured from the lading of them on board a certain ship, "*lost or not lost*," and at the bottom of the policy was added, "*warranted well on a particular day*." It appeared that the defendant underwrote the policy in the afternoon of that day, and that the ship was lost about eight o'clock in the morning of the same day. It was held, that the warranty did not mean that the ship was well at the time when the defendant subscribed the policy, but at *any time* on that day, and consequently that it had been complied with (*r*). Action on a policy of insurance against fire on a ship, for one month on the terms that the ship should be safely moored in the harbour of Portsmouth during the period for which the insurance was made; the ship was accidentally burned within that time. It appeared in evidence, that the ship was first moored off the beach, in order to clear her bottom; she was then removed to Hardway; and, lastly, was moored at March's wharf, in order the more conveniently to take in her cargo, but had never been taken out of the harbour. It was insisted, for the defendant, that the removing the ship from her moorings at one place to the other, was a discontinuance of the risk: so also the laying her down on the beach to clear her bottom. But, *per Lord Ellenborough*, C. J., "Where a vessel is only removed from one part of the harbour to the other, for the more convenient purpose of repairs, or for taking in her cargo, but does

(*n*) *Lang and others v. Anderdon*, 3 B. & C. 495.

(*o*) *Groning v. Crockett*, 3 Campb. 83.

(*p*) *Schroeder v. Vaux*, 3 Campb.

84, n.

(*q*) *Baines v. Holland*, 10 Exch. 802;

24 L. J., Exch. 204.

(*r*) *Blackhurst v. Cockell*, 3 T. R. 360.

not go beyond the bounds of the harbour, and is safely moored at the different parts of the harbour, when she is so removed, according to the policy, it is not such an act as will avoid the policy." Verdict for plaintiff (s). "When a broker proposes a policy to an underwriter, on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there." A delay in the arrival of the vessel at the place where the risk is to attach, alters the risk (t).

3. *To Depart with Convoy*.—The next species of warranty which falls under consideration, is a warranty that the ship insured shall sail or depart with *convoy*; by which term is to be understood "a naval force under the command of a person appointed by the government of the country, to which the vessel insured belongs." The form of expression as to this warranty, is different in different policies; in some that the ship shall depart with *convoy*; in others, that she shall depart with *convoy for the voyage*. In substance, however, these expressions are the same; for it has been solemnly decided, that, although the words of the policy are merely "to depart with *convoy*," yet those words must be understood to mean that the ship shall depart with *convoy for the voyage*, as much as if the words "for the voyage" had been added (u). If a ship does not sail with the *convoy* appointed by government, it is not a sailing with *convoy* within the terms of the warranty (v); hence the protection of a ship of war accidentally bound on the same voyage, although discharging the office of *convoy*, is not a *convoy* within the meaning of the warranty; but a *convoy* appointed by the admiral commanding in chief upon a foreign station, will be considered as a *convoy* appointed by government (x). It may be laid down also, as a general rule, that a warranty to depart with *convoy* is not complied with, unless sailing instructions are obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be obtained.

"The value of a *convoy* appointed by government, in a great measure arises from its taking the ships under control, as well as under protection. But that control does not commence until sailing instructions have been obtained, nor can it be enforced otherwise than by their means. Indeed, the reason of that rule, which requires that the *convoy* should be appointed by government, shows the necessity of having sailing instructions; since without them the ship does not stand in that relation, or under

(s) *Clarke v. Westmore*, London Sitings, B. R., 25 May, 1807.

(t) *Per Ellenborough*, C. J., *Hull v. Cooper*, 14 East, 479, cited by *Tindal*, C. J., *Mount v. Larkins*, 8 Bingh. 123, recognized in *Freeman v. Taylor*, 8 Bingh. 139.

(u) *Per Holt*, C. J., and the greater part

of the court in *Jeffery v. Legendra*, 3 Lev. 321, after several arguments on special verdict, *per tot. Cur.*, Carth. 217; *Lilly v. Ewer*, Doug. 72, S. P.

(v) *Hibbert v. Pigou*, Park, 694; Marsh. 292; 3 Doug. 224.

(x) *S. C.* See also *Audley v. Duff*, 2 B. & P. 111.

those circumstances in which she can take the full benefit of the government convoy" (y).

When the policy is silent as to the place from which the vessel is to depart with convoy, the usage of merchants puts a construction on it, and the warranty must be understood to mean, that the ship shall sail with convoy from the place of general rendezvous, or that place where convoys are to be had: as, if a vessel be insured from London to the East Indies, warranted to depart with convoy, and the ship sail with *convoy from the Downs*, it is a fulfilment of the warranty (z). It is not necessary that the vessel should in all cases sail with convoy bound precisely to the place of her destination (a). Whether the convoy be sufficient must depend on the usage of trade and the orders of government; and it is the province of the jury to determine whether, under the circumstances, the warranty has been satisfied. "It has always been understood, that provisions for a departure with convoy have relation to the custom of trade, and the orders of government, and ought, therefore, to receive a liberal construction" (b). It sometimes happens that the force first appointed is to accompany the ships only for a part of their voyage, and to be succeeded by another; at other times a small force is detached from the main body, to bring them up to a particular point; if a vessel sail under the protection of a force thus appointed (c) or detached (d), the warranty is complied with. Although the terms of this warranty do not express it, yet it is essentially necessary, that the ship should not only depart, but also *continue* with the convoy until the end of the voyage, unless she be prevented by absolute necessity. Case on a policy of insurance on the ship S. from London to Lisbon, *warranted to depart from England with convoy*. The ship sailed from London in December, and arrived at Spithead, (the place where the Lisbon convoy was to be met with,) whence she sailed on the 25th of December, with the convoy. On the 26th December a storm arose, which separated her from her convoy, and rendered her so leaky that she was obliged to sail for Plymouth, where she arrived on the 28th of December. Having been refitted and made a tight ship, as was supposed, she sailed again on the 13th of February following, but *without convoy*. A few days after she encountered another violent storm, and on the 19th of February she was totally lost near Ireland. Lee, C. J., held, that the sense of the warranty was not to be taken literally; that the meaning was not only to *depart* with convoy, but to *keep with* convoy during the whole voyage, and that this had always been so holden: that absolute

(y) *Per Eldon*, C. J., in *Anderson v. Pitcher*, 2 B. & P. 169.

(z) *Lelhuilier's case*, Salk. 443, but *Holt*, C. J., *contra*; *Gordon v. Morley*, Str. 1265, *per Lee*, C. J.

(a) *D'Eguino v. Bewicke*, 2 H. Bl. 551.

(b) *Per Heath*, J., in *Audley v. Duff*, 2 B. & P. 115.

(c) *Smith v. Readshaw*, Park, ch. 18, p. 510; *De Garay v. Clagget*, *ibid.* 511.

(d) *Manning v. Gist*, Marsh. 291; more fully reported, 3 Doug. 74; *Audley v. Duff*, 2 B. & P. 111.

necessity alone, such as rendered it impossible to keep with convoy, could excuse: as being driven by a tempest to some foreign port or place where convoy could not be had; but that was not the present case, the ship having been driven into an English port. He, therefore, was of opinion, that this was not a loss within the policy; and, accordingly, a verdict was found for the defendant (*e*). But if a ship sails with convoy, and is separated by stress of weather, and does all in her power to rejoin the convoy, this will be considered as a sufficient compliance with the warranty, so as to render the insurers liable (*f*). The security of trade, in time of war, has been considered as depending so essentially on ships sailing with convoy, that by a statute (*g*), (which continued in force during hostilities with France), several enactments were made to enforce it.

4. *Neutral Property*.—If the insurance be effected in time of war and the party insuring be the subject of a neutral state, it is usual for him, in order to induce the underwriter to accept a smaller premium, to warrant that the subject-matter of the insurance is neutral property, which is usually done by inserting in the policy the words “warranted neutral,” or “warranted neutral property;” by which is to be understood, that the thing insured is neutral property at the time when the risk commences, not that it shall continue so during the whole voyage, for the risk of *future* war is undertaken by the insurer in every policy (*h*). But though it is not necessary, that a ship, warranted neutral, should continue neutral during the whole voyage: because, if she be neutral at the time of sailing, the breaking out of war on the next day will not discharge the underwriter; yet the ship must not forfeit its neutrality by the misconduct of the parties on board: hence where, on an insurance of a ship warranted neutral, it appeared that the master and crew had broken their neutrality, in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power, for the purpose of search; it was held, that the assured could not recover (*i*).

In order that a warranty of neutrality may be satisfied, it is necessary, 1. That the vessel insured should belong to the subject of a neutral state; 2. That the vessel should be navigated, not only according to the law of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and the belligerent states (*j*). If, therefore, a state in amity with

(*e*) *Morrice v. Dillon*, London Sittings after M. T. 22 Geo. II., coram, *Lee*, C. J., MSS.

(*f*) *Jeffery v. Legendra*, 3 Lev 320; Carth. 216; Salk. 443; 1 Show. 320; 4 Mod. 58; reported for the judgment only in Holt, 465.

(*g*) Stat. 43 Geo. III. c. 57. See

Cohen v. Hinckley, 1 Taunt. R. 249.

(*h*) *Eden v. Parkinson*, Doug. 732, a; *Tyson v. Gurney*, 3 T. R. 477, per *Buller*, J., in *Saloucci v. Johnson*. Park, 716.

(*i*) *Garrels v. Kensington*, 8 T. R. 230.

(*j*) Courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular states; such

a belligerent power has, by treaty, agreed that the ships of their subjects shall only have that character when furnished with certain documents; whoever warrants the ship to be the property of such subject, should provide himself, at the time when the ship sails, with those documents which have, by the country to which she belongs, been agreed to be the necessary proof of that character. There is no implied warranty on the part of the owner of *goods* insured that the ship shall be in all respects properly documented (*k*). In an action on a policy upon a ship warranted Dutch property, it appeared that the ship in question was originally a French privateer, bearing a French name; that having been captured by the English, she was carried into Liverpool, and there named the Three Graces. A merchant there purchased her for a house at Amsterdam. Having been insured by a Dutch name, and warranted as in the policy, she went to sea, was captured by the French, and finally condemned by the parliament of Paris, under her English name, as lawful prize. The court were of opinion, that the sentence of the parliament of Paris was conclusive against the warranty (*l*). So where it appeared, that a ship, warranted American, had not on board a passport, which was required by the treaty between France and America; it was held, that the assured could not recover, inasmuch as the warranty had not been complied with; for that required that the ship should be entitled to all the privileges of the American flag, and in order to be entitled to these privileges, she should have had a passport (*m*). But it is not necessary, in order to satisfy a warranty of neutrality, that the vessel should be navigated in conformity to an *ex parte* ordinance made by one of the belligerent states, and to which the neutral state is not a party (*n*). A neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality; provided that neither the voyage nor commerce be of a hostile description, nor otherwise expressly or impliedly forbidden by the law of this country; although such ship, in consequence of carrying enemy's property, be liable to detention or to be carried into British ports for the purpose of search (*o*). Nor is it an offence against the law of nations or the law of this country for the subjects of a neutral state to supply contraband of war to a belligerent (*p*). The evidence usually adduced to falsify this

treaties do not alter the *jus gentium* with respect to the rest of the world, but as between those particular states they are considered as engrafted on the *jus gentium*. Per Lord Kenyon, C. J., in *Bird v. Appleton*, 8 T. R. 567.

(*k*) *Carruthers v. Gray*, 3 Campb. 142; 15 East, 35; and see also *Bell v. Carrstairs*, 14 East, 393.

(*l*) *Barzillai v. Lewis*, Park, 725, and MS. note of Buller, J., cited by Lawrence J., in *Pollard v. Bell*, 8 T. R. 441; 3

Doug. 126.

(*m*) *Rich v. Parker*, 7 T. R. 705. See further on this subject, *Baring v. Christie*, 5 East, 398.

(*n*) *Mayne v. Walter*, Park, 730; 3 Doug. 79; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, 8 T. R. 562; *Price v. Bell*, 1 East, 663.

(*o*) *Barker v. Blakes*, 9 East, 283.

(*p*) *Ex parte Chauvasse*, 34 L. J. Bk. 17; *The Helen*, 35 L. J. Ad. 2; *Hobbs v. Hemms*, 17 C. B. N. S. 791; 34 L. J. 119.

warranty, or to prove a breach or forfeiture of neutrality, which amounts to a breach or forfeiture of the warranty, is the judgment or sentence of a court of admiralty, or other court having jurisdiction in questions of prize, by which the ship or goods insured, and warranted neutral property, have been condemned as prize (q).

All sentences of foreign courts of competent jurisdiction to decide questions of prize, are to be received in this country as conclusive evidence in actions upon policies of insurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially (r). Consequently, where such sentences are given in evidence, and it appears that they proceed on a ground which falsifies the warranty of neutrality, the assured will thereby be prevented from recovering. In one case, indeed, where a ship was condemned as lawful prize in a foreign court of admiralty, and it was not stated in the sentence upon what ground the condemnation proceeded; it was held, that a sentence of condemnation, as lawful prize, afforded a presumption that the goods were enemy's property, unless the contrary appeared on the sentence (s). In *Baring v. Clagett*, 3 Bos. & Pul. 201, the court, being of opinion that the sentence of condemnation proceeded either on the ground of the ship not being neutral property, or on the ground that she was not properly documented, so as to entitle herself to the privileges of a neutral, adjudged the sentence to be conclusive evidence against a warranty of neutrality. Whether the foreign sentence profess distinctly and directly to condemn the ship, on the ground of its being enemy's property, or whether it can be collected only from other parts of the proceedings, that such was the ground of decision (t), our courts are equally bound by the sentence; and this rule holds, although it appears on the face of the sentence, that the prize court arrived at the conclusion through the medium of rules of evidence, and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles (u). In short, wherever the foreign courts adjudge the vessel to be good prize, upon a ground within their jurisdiction, and such ground falsifies the warranty, our courts will, by the comity of nations, which has always prevailed among civilized states, give credit to and consider themselves bound by their adjudication, without examining the reasons by which the foreign courts have arrived at their conclusion (v). Hence, as

(q) Marsh. 288.

(r) 3 B. & P. 499, *per Ellenborough*, C. J., delivering the opinion of the court in *Bolton v. Gladstone*, 5 East, 155, and *per Sir J. Mansfield*, C. J., in *Siffken v. Lee*, 2 N. R. 489.

(s) *Saloucci v. Woodmass*, Park, 727; 3 Doug. 345.

(t) *Bolton v. Gladstone*, 5 East, 155.

(u) *Ibid.*, 2 Taunt. 85.

(v) "A warranty of neutrality must, I

conceive, now be understood, as containing in itself (among other things) a stipulation that the contract of assurance shall be void, if the subject-matter warranted neutral be condemned as enemy's property; and, if a warranty of neutrality contains this stipulation, the sentence of a court of competent jurisdiction, condemning a ship on account of its want of neutrality, is the proper evidence, according to every principle and rule of

foreign courts of admiralty may decide on the construction of treaties, if they expressly adjudge a ship to be lawful prize for a breach of treaty, such sentence is conclusive in our courts against a warranty of neutrality, although in this sentence the foreign court may have referred to *ex parte* ordinances, and drawn inferences from such ordinances, in order to show an infraction of treaty. The sentence is equally to be regarded as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation (*w*). In the case of an insurance upon ship, goods and freight, all belonging to nearly the same American proprietors, which, as it appeared by the sentence, had been condemned on account of the common default of all the proprietors, *in their joint character of ship-owners*, in not having a regular passport on board, as required by the treaty of their own state with France; it was held, that the assured could not claim from the underwriter an indemnity for a loss thus occasioned by themselves, although the ship was not warranted or represented to be an American; for the ship-owner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect to such nations (*x*). By the sentence of a French court of admiralty, it appeared that the ship insured, "*warranted American*," had been condemned as enemy's property, for want of having on board a *rôle d'équipage*, or list of the crew such as was required by a marine ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America; it was held, to be conclusive evidence of the falsification of the warranty of neutrality, though, in fact, the ship was American (*y*). So where the sentence states, that the ship was condemned on the ground of having violated her neutrality, and acted contrary to the law of nations and the faith of treaties, such sentence is conclusive evidence to falsify the warranty of neutrality (*z*). But where the grounds of confiscation are stated obscurely, and the court cannot collect what the precise ground was (*a*); or where the sentence adjudges the ship to be lawful prize, not because it is enemy's property, but for reasons which lead to a contrary conclusion (*b*); or if it appear that the condemnation proceeded *solely* on the ground of the ship having violated an *ex parte* ordinance, to which the neutral country had not assented (*c*); in such cases, the sentence is not conclusive evidence against the warranty of neutrality.

our law, to determine that fact." *Per Lawrence, J.*, in *Lothian v. Henderson*, 3 B. & P. 524.

(*w*) *Baring v. Royal Exch. Ass. Comp.*, 5 East, 99.

(*x*) *Bell v. Carstairs*, 14 East, 374.

(*y*) *Geyer v. Aguilar*, 7 T. R. 681.

(*z*) *Garrels v. Kensington*, 8 T. R. 230.

(*a*) *Bernardi v. Motteux*, Doug. 575; *Fisher v. Ogle*, 1 Campb. 418.

(*b*) *Calvert v. Bovill*, 7 T. R. 523, recognized by *Tindal, C. J.*, delivering judgment, *Dalglish v. Hodgson*, 7 Bingh. 504.

(*c*) *Bird v. Appleton*, 8 T. R. 562.

It is to be observed, also, that the sentence of a foreign court, where it is conclusive, is conclusive only as to the grounds of the sentence, and not as to the premises which led to the conclusion (*d*). The preceding remarks, as to foreign sentences of condemnation, being conclusive evidence to falsify the warranty of neutrality, must be confined to legal sentences, that is, sentences of a prize-court, acting and exercising functions either in the belligerent country, or in the country of a co-belligerent or ally in the war (*e*); for sentences of condemnation, pronounced by the authority of the capturing power, *within the dominions of a neutral country*, to which the prize may have been taken, are illegal, and consequently inadmissible (*f*). And this is to be considered as a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although a belligerent may have such a body of troops stationed there as in reality to possess the sovereign authority (*g*).

5. *Free of Capture in Port*.—If a vessel is taken at her moorings, being neither within the *caput portus*, nor within that part of a haven where ships unload, the underwriter is not discharged by a warranty against “capture in the ship’s port of destination” (*h*). Whether a vessel warranted free of capture in port, be in a port or not at the time of her capture, is purely a question of fact for the jury (*i*). The assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture, if it appear by the sentence of the foreign prize-court that one of the causes stated for the condemnation was the carrying of simulated papers (*j*).

Implied Warranty.

1. *Not to deviate*.—Another condition implied in the contract of insurance is, that the ship shall not deviate. Hence arises another ground of defence, on which the underwriter may insist, *viz.* that there has been a *deviation*, by which term is to be understood a wilful and unnecessary departure from the due course of the voyage insured, either with or without the consent of the assured, for any, even the shortest space of time. The effect of a deviation is not to avoid the contract *ab initio*, but only to determine it from the time of the deviation, and to discharge the insurer from all subsequent responsibility. Hence, damage sustained before the actual deviation must be made good by the underwriters (*k*). From the

(*d*) *Christie v. Secretan*, 8 T. R. 192.

(*e*) *Oddy v. Bovill*, 2 East, 473.

(*f*) *Havelock v. Rockwood*, 8 T. R. 268;
The Flad Oyen, 1 Rob. A. R. 135.

(*g*) *Donalson v. Thompson*, 1 Campb. 429.

(*h*) *Keyser v. Scott*, 4 Taunt. 660.

(*i*) *Reyner v. Pearson*, 4 Taunt. 662.

See further *Oom v. Taylor*, 3 Campb. 204,
and *Maydhew v. Scott*, *ib.* 205.

(*j*) *Oswell v. Vigné*, 15 East, 70. But
secus, if leave be given to carry simulated
papers. *Bell v. Bromfield*, 15 East, 364.

(*k*) *Green v. Young*, 2 Raym. 840;
Salk. 444.

moment of deviation, however, the contract is at an end, and it is immaterial from what cause the subsequent loss arises. If two ports of discharge are named in the policy, and the ship intends going to both, she must take them in the order named in the policy. Hence, where a ship insured for A. and B., meaning to go to both, went first to B. in her way to A.: it was held to be a deviation from the voyage insured, not being in the order named in the policy (*l*). Upon a policy from London to Trinidad or the Spanish Main, with leave to call at all or any of the West India Islands or settlements, and with liberty to touch and stay at any parts or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of his voyage insured (*m*). A policy at and from Martinique *and all* and every West India Islands, warrants a course from Martinique to islands not in the homeward voyage (*n*). A ship having liberty to put into one port, put into another equally in her way; this was held to be a deviation, and to avoid the contract, though neither the risk nor the premium would have been greater, if the putting into such other port had been allowed by the policy (*o*). A ship was insured from Lisbon to England, with liberty to call at any one port in Portugal; it was held that under such a policy the party had only a liberty to call at some port in Portugal, in the course of the voyage to England (*p*). A vessel was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and *from thence* to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of, and at, the Cape of Good Hope." She sailed direct from Liverpool to a port in China, having a cargo for that port and Manilla; from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla the captain took on board as freight, 200 chests of opium, for Tongkoo, another port in China, (not being thereby a tenth laden) and sailed for Tongkoo, there to seek a freight for the United Kingdom; and on the ship's voyage thither she was lost by perils of the seas. Tongkoo is quite out of the direct course from Manilla to the United Kingdom. It was held that the words "from thence" in the policy, meant not "from Manilla" only, but from "ports or places in China and Manilla, all or any," and that the sailing from Manilla to Tongkoo, for the purpose of seeking a homeward cargo was not, therefore, a deviation (*q*). Where a ship insured to Martinique, and all or any of the Windward and Leeward Islands, landed the greater part of

(*l*) *Beatson v. Haworth*, 6 T. R. 531.

(*m*) *Gairdner v. Senhouse*, 3 Taunt. 16.

(*n*) *Bragg v. Anderson*, 4 Taunt. 229.

(*o*) *Elliott v. Wilson*, 7 Bro. P. C. 459;
4 Bro. P. C. 470, Tomlins' edit.

(*p*) *Hogg v. Horner*, Marsh. 197. But

see *Leathley v. Hunter*, 7 Bingh. 528, *post*,
p. 951; and *Ashley v. Pratt*, 16 M. &
W. 471.

(*q*) *Ashley v. Pratt*, 16 M. & W. 471;
affirmed on error, 1 Exch. 257; 17 L.
J., Exch. 135.

her cargo at Martinique, and sailed with the residue to Antigua, where she was wrecked while stopping partly to dispose of the residue of the outward cargo, and *partly to obtain a homeward cargo*; it was held, that the underwriters were not liable: for, *per Lord Ellenborough*, C. J., when the disposal of the outward cargo ceased to be the sole reason for the stay at Antigua, the underwriters were discharged (r). A policy of insurance on goods at and from London to the ship's discharging port or ports in the Baltic, *with liberty to touch at any port or ports for orders*, or any other purpose, does not warrant the assured, after having touched at C. for orders, and gone on to S., a more distant port, in retouching at C. for orders: but if the policy be to any and all ports and places in the *Baltic, forwards and backwards and backwards and forwards*, it is otherwise (s). Under a liberty to touch and stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure (t). Whether the purpose is within the scope of the policy, is a question for the court solely, and not for the jury; and if the policy does not limit the time of stay, it is also a question for the jury whether a ship has stayed an unreasonable time (u). A policy of insurance "at and from London to Berbice," was effected upon the receipt of a letter from the captain (which was shown to the underwriter) stating that he had passed Barbadoes, and the words "at sea," were inserted in the policy after the printed clause describing the beginning of the adventure on the goods. It was held notwithstanding, that the policy was vacated by a deviation at Madeira, in a former part of the voyage (x). A ship was insured from London to the southern whale fishery and back again, "with leave to carry letters of marque, and to cruise for, chase, capture, man, and *see into port*, any ships of the king's enemies." It was held, that although the ship insured might be authorized under the terms of this policy, in accompanying prizes to any convenient port consistently with the main adventure, seeing them safely moored there, and perhaps stopping a reasonable time to give directions for their proceeding on their final destination, yet *remaining in port until a prize was repaired*, could not be considered as warranted by those terms (y).

A deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Hence, where a policy was effected on a ship carrying letters of marque from Bristol to Newfoundland, and the orders of the owners were to put a few hands on board any prize that might be taken,

(r) *Inglis v. Vaux*, 3 Campb. 437; *Ld. Ellenborough*, C. J., *Moore v. Taylor*, 1 A. & E. 25; 3 Nev. & M. 406, S. P.

(s) *Mellish v. Andrews*, 16 East, 312.

(t) *Langhorn v. Allnutt*, 4 Taunt. 511.

(u) *Ibid.*

(x) *Redman v. London*, 3 Campb. 503, C. B., *per Sir J. Mansfield*, and afterwards confirmed by the court.

(y) *Jarratt v. Ward*, 1 Campb. 263.

and send her to Bristol, but that the ship should proceed to Newfoundland; notwithstanding *the crew obliged the captain* to go back to Bristol with a prize, taken during the voyage, and in so doing the ship was captured; it was held, that this deviation was justifiable, and that the underwriter was not discharged from his obligation to indemnify the assured (2). The owner of a ship (which was about to sail on a voyage from Lisbon to Madeira, from Madeira to Saffi, on the coast of Africa, in ballast, and thence to Lisbon with a cargo) was desirous of having the insurance effected on part of the freight from Saffi to Lisbon. The underwriters objected, on account of the distant period at which the risk was to commence; however, on a representation some time afterwards, by the owner, that he had received intelligence of the ship's arrival at Madeira, and that she was about to proceed immediately on her voyage, the insurance was effected. When the ship arrived at Madeira, all the crew, except two, being alarmed by reports of some Moorish cruisers being off Saffi, and of their having captured and ill-treated a Dane and an American, quitted the ship, and refused to return to it, unless the captain would promise to sail immediately for Lisbon. Under these circumstances, the captain carried the ship back to Lisbon; but on his arrival there, the charterers insisted on his proceeding directly from thence to Saffi, which he accordingly did, and was captured on his return from Saffi to Lisbon. It was in evidence, that the difference of season, arising from this delay, did not vary the risk. It was held, that the deviation was justified by the special circumstances (a). And this rule holds as well in the case of a limited as a general policy. Hence, where a policy was effected on goods on board a ship for a certain voyage, "against sea risk and fire only," and the ship was forcibly carried out of the course of her voyage, and detained by a king's ship, but afterwards was released, and permitted to proceed on the voyage insured, during which the goods insured sustained sea-damage; it was held, that the deviation having been occasioned by force, and without any consent on the part of those who had the management of the ship, the underwriter was liable, although the voyage was made longer than it otherwise would have been, by the detention of the king's ship (b).

An unreasonable delay *in performing the voyage insured*, is equivalent to a deviation (c); as where a ship insured "at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves," stayed several months beyond the usual stay of ships in that trade. It is immaterial whether the risk has or has not been thereby increased. So a *delay in the commencement of*

(2) *Elton v. Brogden*, 2 Str. 1264.

(a) *Driscoll v. Passmore*, 1 B. & P. 200.
See also *Driscoll v. Bovil*, 1 B. & P. 313.

(b) *Scott v. Thompson*, 1 N. R. 181.

(c) *Hariley v. Buggin*, M. 22 Geo. III., Park, 652; 3 Doug. 39, recognized in *Mount v. Lurkins*, 8 Bingh. 121.

the risk, by the interposition of an intermediate voyage not communicated to the underwriters, will discharge the policy; unless such intermediate voyage was one, which was made usually and according to the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters (*d*). So where the delay before the ship arrived at the port where the policy was first to attach was unreasonable and unjustifiable, the underwriter was discharged (*e*). So where the insurance was effected on January 28th, on a vessel afloat "at and from Bristol to London;" and the vessel (a yacht) did not sail until the 17th of May; it was held, that the delay unaccounted for was unreasonable, and that the underwriter was discharged, although the vessel was one which did not usually sail in the winter (*f*). In a subsequent trial on the same policy, the jury found that the delay was sufficiently accounted for, and the plaintiff obtained a verdict (*g*).

Going into port for the purpose of refitting or repairing (*h*), or stress of weather (*i*), or avoiding an enemy, or seeking for convoy (*k*), are *grounds of necessity*, and will justify a deviation.

A vessel may deviate somewhat from the straight line of her track to seek for convoy; and the captain, unless expressly prohibited by the terms of the policy, may always do what is necessary for the safety of the ship. A vessel insured may do whatever it would be expedient for the common security to do if uninsured (*l*). But where a ship was insured *from London to Berbice*, with an extensive liberty of touching and trading at all places; it was held, that by putting into Madeira, and voluntarily staying there for the purposes of trade, after the convoy, with which she sailed, had proceeded on the voyage, she was guilty of a deviation, which discharged the underwriters (*m*). Whenever such circumstances exist as render a deviation necessary (*n*); the voyage (which may then be termed a voyage of necessity) must be pursued according to its due course in like manner as the original voyage.

An intention to deviate from the due course, not carried into execution, will not be considered as a deviation (*o*). Where goods were insured from Heligoland to Memel, with liberty to touch at any ports, and to seek, join, and exchange convoy, warranted free from capture in the port of Memel, and the ship sailed from Heligoland with orders to go to Gottenburgh to know whether to

(*d*) Admitted, *Vallance v. Dewar*, 1 Campb. 505; *Ougier v. Jennings*, *ibid.* n.

(*e*) *Mount v. Larkins*, 8 Bingh. 108, recognized in *Freeman v. Taylor*, 8 Bingh. 139, and *ante*, p. 940; and in *Phillipps v. Irving*, 8 Scott's N. R. 8.

(*f*) *Palmer v. Marshall*, 8 Bingh. 317.

(*g*) *Palmer v. Fenning*, 9 Bingh. 460.

(*h*) Admitted by Lord Hardwicke, Ch., in *Motteux v. London Ass. Comp.*, 1

Atkyns, 545.

(*i*) *Delany v. Stoddart*, 1 T. R. 22.

(*k*) *Bond v. Gonsales*, Salk. 445.

(*l*) *D'Aguiar v. Tobin*, 1 Holt's N. P. C. 185, C. B., Gibbs, C. J.

(*m*) *Williams v. Shee*, 3 Campb. 469, B. R., Lord Ellenborough, C. J.

(*n*) *Lavabre v. Wilson*, Doug. 284.

(*o*) *Foster v. Wilmer*, Str. 1249; *Thellusson v. Fergusson*, Doug. 361; *Kewley v. Ryan*, 2 H. Bl. 343.

proceed to Anholt or Memel, and was captured in her way to Gottenburgh, which is in the track either to Anholt or Memel: it was held, that this was to be considered as a voyage to Memel, although it was subject to be changed according to circumstances upon the ship's arrival at Gottenburgh; and therefore the risk commenced on her leaving Heligoland; and the ship never having reached Gottenburgh, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable (*p*). Policy of assurance on goods at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever: it was held, that the ship having touched at C. for orders and gone on to S., a more distant port, for further orders, and having received orders at S., because it was unsafe to land there, to return to C. and wait for orders, might so return to C. without being guilty of a deviation; it being found that she went to S. for orders in the prosecution of her voyage; and returned to C. to obtain orders as to the further progress of the voyage, and no fraud being found (*q*). So where the policy was "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, &c., upon goods in certain ships, beginning the adventure from the loading thereof aboard the said ships;" the ship took in part of her cargo at Batavia, and then went to Sourabaya, another port in the East Indies, (not in the course of a voyage from Batavia to Europe, and not mentioned by name in the policy,) and took in other goods; then returned to Batavia, whence she afterwards sailed to Europe, and was lost by perils of the sea; it was held, that Sourabaya, being a place in the East Indies, might be considered as a loading port or *terminus a quo*, within the meaning of the policy; and consequently that the going there was not a deviation, and the goods there taken on board were protected (*r*).

In a policy on ship and freight it is not an implied condition that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the underwriters. Hence, where a ship was compelled in the course of her voyage to enter a port, for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her loading

(*p*) *Hesilton v. Allnutt*, 1 M. & S. 46.

(*q*) *Mellish v. Andrews*, 2 M. & S. 27.

(*r*) *Hunter v. Leathley*, 10 B. & C. 858.

Affirmed on error, 7 Bingh. 517.

ports, and during her justifiable stay in the port so entered for that purpose she took on board bullion for freight, the jury having found that no delay in the voyage was occasioned thereby; it was held, not to avoid the policy (s). So where a ship had liberty to touch at a port; it was held, not to be any deviation to take in a quantity of salt during her stay there, the ship not having thereby exceeded the period allowed for her remaining there (t). *Note.* In this case a communication had been made to the underwriter that the ship was to touch for the purpose of trade. It seems, however, that the words "liberty to touch" will not authorize a general trading (u). Assumpsit on a policy on freight of a ship at and from Grenada to London. It was proved that there is only one custom-house for the whole island of Grenada, that the vessel arrived in safety at Grenada, and discharged parts of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo, and take in part of her homeward cargo, when she was lost by perils of the sea: it was held, that the vessel, at the time of the loss, was proceeding to this fourth bay for a purpose connected with the voyage insured, and, consequently, that it was not a deviation (v).

There has been much doubt whether a deviation, for the purpose of succouring a vessel in distress, will avoid the policy. In *Lawrence v. Sydebotham* (x), Lord *Ellenborough* expressly avoided giving any judgment on the point, which has not yet arisen directly in a court of law; but the inclination of his opinion (which will probably be followed by the courts) was, that when such a case did arise, it would be found to be for the general benefit of all insurers to allow such succour to be given without imputing deviation to the succouring ship.

2. *Seaworthiness*.—"In the case of an insurance for a certain voyage," says *Parke*, B., "it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it" (y). Any defect which may endanger the ship, though unknown to the assured, will discharge the underwriter; for it is the duty of the assured to provide a good ship in such state and condition as to be able to perform the destined voyage, *i. e.* seaworthy. As to any decay to which the loss of the ship may be attributed, the question will be, whether the same commenced previously to, or after, the

(s) *Raine v. Bell*, 9 East, 195, recognized in *Laroche v. Oswin*, 12 East, 131.

(t) *Urquhart v. Barnard*, 1 Taunt. 450.

(u) *Per Sir J. Mansfield, S. C.*, 1 Taunt. 456. See further on this subject, *Phelps*

v. Auldjo, 2 Campb. 350.

(v) *Warre v. Miller*, (in error,) 4 B. & C. 538.

(x) 6 East, 52.

(y) *Dixon v. Sadler*, 5 M. & W. 414.

insurance made. If a ship, in a short time after having sailed, becomes leaky, and founders, or is obliged to return to port, there not having been any storm, external accident, or cause adequate to the producing such effect, it may be presumed that she was not, at the time of sailing, seaworthy (*z*); but the conclusion, in all cases of this kind, is to be drawn by the jury, to whom the several circumstances are to be submitted. If the ship be insured at and from a port, although in want of repairs, she is protected by the policy whilst in the port. The condition that she shall be seaworthy for the voyage does not attach until her sailing (*a*). Where a ship is insured at and from a foreign port it is necessary that she should have once been *at* the place in good safety; for if she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches (*b*).

Where the insurer is made aware of the exceptional character of a ship in point of size, form, &c., the warranty of seaworthiness is satisfied by showing that she was made as seaworthy as she was capable of being made (*c*).

Where a voyage insured consists partly of river and partly of open sea navigation, the warranty as to seaworthiness is satisfied if she be properly manned and equipped for each stage of the navigation (*d*).

In a policy on cargo, "including all risk to and from the ship," the doctrine of implied warranty of seaworthiness does not extend to the lighters (*e*).

Where the master of a ship sails from a British port of North America or Honduras for a port in the United Kingdom, in violation of regulations enacted by Parliament that no master shall during certain periods sail until he has obtained a certificate from the clearance officer that there is no deck cargo, and that he shall not, after obtaining such certificate, place any cargo upon deck, and there is a penalty imposed upon the master for breach of these regulations, a policy on the ship or cargo is or is not vitiated, according as the owner is or is not privy to the act. Sailing without conforming to the provisions of the Act is not a "statutory" unseaworthiness (*f*).

When the assured have once provided a sufficient crew, the negligent absence of all the crew, at the time of the loss, is not any breach

(*z*) *Franco v. Natusch*, 1 Tyr. & Gr. 401.

(*a*) *Annen v. Woodman*, 3 Taunt. 299.

(*b*) *Parmeter v. Cousins*, 2 Campb. 235.

(*c*) *Burgess v. Wickham*, 33 L. J., Q. B. 17; *Clapham v. Langton*, 5 B. & S. 729, in error.

(*d*) *Bouillon v. Lupton*, 15 C. B., N. S.

113; 33 L. J., C. P. 37.

(*e*) *Lane v. Nixon*, L. R., 1 C. P. 412; 35 L. J. 243.

(*f*) *Wilson v. Rankin*, 1 L. R. 162, Q. B.; 6 B. & S. 208, in error; *Cunard v. Hyde*, 1 E. B. & E. 670; *Cunard v. Hyde*, 2 E. & E. 1. *Law v. Hollingsworth* can scarcely be considered law; see *Sadler v. Dixon*, 8 M. & W. 900.

of the implied warranty that the ship shall be properly manned (*g*). "The great principle," says *Parke*, B., "established by the more recent decisions is, that if the vessel, crew, and equipments be originally sufficient, the assured has done all that he has contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew" (*h*). Where a vessel, engaged in the southern whale and seal fishery, and with liberty to chase and capture prizes, was insured in August 1807, with a retrospect to the 1st of August, 1806, although at the time of her insurance she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties; it was held that if she had a competent force to pursue *any* part of her adventure, and could be safely navigated home, she was to be deemed seaworthy (*i*).

In the case of *Gibson v. Small* (*j*), it was decided by the House of Lords that, in a *time* policy upon a ship, framed in the usual terms, no special circumstances appearing respecting the situation and employment of the ship, there is not an implied warranty that the ship is seaworthy on the day when the policy ought to attach. And in the subsequent case of *Thompson v. Hopper* (*k*), the Court of Exchequer Chamber appears to have agreed with the Court of Queen's Bench, that in no case of a *time* policy is there any such implied warranty of seaworthiness: and held, further, that unless the actual cause of the loss of the ship was its unseaworthiness, the underwriters were liable, although the ship might have been sent to sea in an unseaworthy state (*l*).

In an insurance on a voyage policy upon goods there is no implied warranty that they shall be seaworthy, *i. e.* that they shall be in a fit state to encounter the ordinary perils incident to the voyage. The proper way to meet a case where goods perish by an inherent weakness is to plead that they were not lost by a peril insured against (*m*).

5. *Re-assurance.*

Re-assurance is a contract made by the first insurer or underwriter, with a view of securing himself from a risk, by throwing it on other underwriters, who are termed re-assurers. This is allowed in almost all the trading countries in Europe, and was permitted by the law of England, until the stat. 19 Geo. II., c. 37, by the fourth section of which re-assurance is prohibited, except in three

(*g*) *Busk v. Royal Exch. Ass. Comp.*, 2 B. & A. 73.

(*h*) *Dixon v. Sadler*, 5 M. & W. 405, affirmed in Exch. Cham., 8 M. & W. 900; *Biccard v. Shepherd*, 14 Moore, P. C. C. 471.

(*i*) *Hucks v. Thornton*, Holt's N. P. C. 30, C. B., *Gibbs*, C. J.

(*j*) 4 H. L. Cas. 353.

(*k*) 27 L. J., Q. B. 441. See, also,

Michael v. Tredwin, 17 C. B. 551; 25 L. J., C. P. 83; *Jenkins v. Haycock*, 8 Moore, P. C. 351, and *Fawcus v. Sarsfield*, 6 E. & B. 192; 25 L. J., Q. B. 249.

(*l*) *Thompson v. Hopper*, 6 E. & B. 937; 26 L. J., Q. B. 18.

(*m*) *Koebel v. Saunders*, 17 C. B. (N. S.), 71; 33 L. J., C. P. 310.

cases : 1. The insolvency of the insurer ; 2. His bankruptcy ; 3. His death ; and even in these cases it must be expressed in the policy to be a re-assurance, and the re-assurance must not exceed the amount of the sum before assured.

Although the first section of the above-mentioned statute does not extend to foreign ships, yet the fourth section does. Consequently a re-assurance, even by a foreigner, on a foreign ship, is illegal (n).

6. *Wager Policy*—Stat. 19 Geo. II. c. 37.—*Interest of Assured.*

An insurance being a contract of indemnity, its object is not to make a positive gain, but to avert a possible loss. Hence, as a person cannot be said to be indemnified against a loss which can never happen to him, a policy without interest is not an insurance, but a mere wager only. Such policy, therefore, is properly denominated a wager policy. Although contradictory decisions are to be found in the books as to the legality of wager policies, before the stat. 19 Geo. II., yet they have been recognized as legal contracts by modern judges ; and it seems now to be admitted, that by the law of merchants, and particularly by the law of England, as it stood at the time of passing the act 19 Geo. II., a wager policy, in which the parties, by express terms, such as the words—"interest or no interest," or "without proof of interest," disclaimed the intention of making a contract of indemnity, was then (contrary to older determination) deemed a valid contract of insurance ; but that a policy containing no such clause, disclaiming or dispensing with the proof of interest, was to be considered as a contract of indemnity only, upon which the assured could never recover without proof of an interest (o). But it having been found by experience, that the making assurances, "interest or no interest, or without further proof of interest than the policy," had been productive of many pernicious practices, and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution, and laudable design of making assurances had been perverted ; and that which was intended for the encouragement of trade and navigation, had, in many instances, become destructive to the same : it was enacted, by stat. 19 Geo. II. c. 37, s. 1, "That no assurances should be made by any persons, bodies corporate or politic, on any ships *belonging to his Majesty, or any of his subjects* (p), on any goods laden, or to be laden, on board such ships, interest or no interest,

(n) *Andrée v. Fletcher*, 2 T. R. 161.

(o) See the opinion of *Chambre, J.*, in *Lucena v. Craufurd*, 3 B. & P. 101, and of Lord *Hardwicke*, in *The Sadlers' Company v. Badcock*, 2 Atk. 556.

(p) This section does not apply to the case of foreign ships, and insurances, "interest or no interest," may be made

upon them. *Thellusson v. Fletcher*, Doug. 315. And although the words "interest or no interest," are omitted in the policy on a foreign ship, yet in declaring on such policy, it is not necessary to aver that the assured had an interest. *Craufurd v. Hunter*, 8 T. R. 13 ; *Nantes v. Thompson*, 2 East, 385.

or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that such assurances should be void." But by sect. 2, it is provided, "That insurances on private ships of war, fitted out by any of his Majesty's subjects, solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer." And by sect. 3, it is also provided, "That any effects, from any port or places in Europe or America, in possession of the crowns of Spain and Portugal, may be insured in the same manner as if this act had not been made."

Having detailed the provisions of the stat. 19 Geo. II. c. 37, it will be necessary briefly to consider what that interest is, the protection of which is the proper object of a policy of assurance. And this is to be collected from considering what is the nature of such contract (*q*). Now insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss or damage by the happening of the perils specified to certain things, which may be exposed to them. This being the general nature of the contract, it follows, that it is applicable to protect persons against uncertain events, which may in anywise be of disadvantage to them; not only those persons, to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also, who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things. That a person must some how or other be interested in the preservation of the subject-matter exposed to perils, follows, from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. Interest, therefore, with reference to the subject under consideration, does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage to the person insuring; and where a person is so circumstanced, with respect to matters exposed to certain risks, as to have a moral certainty of advantage but for those risks, he may be said to be interested in the safety of the thing.

Having endeavoured to explain the nature of an insurable interest,

(*q*) *Per* Lawrence, J., in *Iucena v. Craufurd*, D. P., 2 N. R. 300, where this subject is very elaborately discussed.

it will be proper to add, that it is not necessary such interest should be indefeasible; for the consignee of goods under a bill of lading has an insurable interest in such goods, although they may be stopped in transitu on their passage home (*r*). So also has an executor before probate. In like manner it has been held, that where a ship was taken as prize by the conjoint forces of the army and navy, the captors, before condemnation, had an insurable interest under stat. 45 Geo. III. c. 72, s. 3, whereby the crown gave up its right in the prize to the captors, although such interest was defeasible, as well by the release of the crown, as the adjudication of the Court of Admiralty (*s*). The owner of a ship, who has chartered her for a particular voyage, has an insurable interest in the ship during that voyage, although the charterparty contain a stipulation, that, in case the ship be lost, the charterer shall pay the owner the estimated value of the ship (*t*). Assumpsit on a policy of insurance. The plaintiffs were entitled, under a verbal agreement, to a cargo on board a ship when it should arrive at port. The ship was lost at sea; it was held, that the plaintiffs had no insurable interest in the goods, as the contract which they had entered into, being verbal only, was incapable of being enforced (*u*). An interest in profits arising out of contracts entered into by the assured is insurable; but care should be taken where the goods have not been shipped on board, that the interest is specially provided for by the terms of the policy (*v*); and such insurance of profits is within the statute 19 Geo. II. c. 37 (*x*), and if made "without benefit of salvage," is void, and it makes no difference that the policy is made "free from average" (*y*). Warehousemen and wharfingers, with whom goods are deposited, have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance; and such goods are properly described in a policy as "goods in trust" (*z*).

K., an East India captain, having borrowed money of R., in order to secure R., arranged with P. that K. should draw in favour of R. bills on C. (P.'s agent in Calcutta), payable thirty days after the arrival of the ship B., which bills R. was to indorse to P., and P. was to negotiate on Calcutta upon K.'s consigning to C. goods to double the amount of the bill; it was held, first, that P. had no insurable interest in these bills; secondly, that even supposing he

(*r*) *Per* Lord Ellenborough, C. J., 11 East, 628.

(*s*) *Stirling v. Vaughan*, 11 East, 619; 2 Campb. 225; *S. C.*, cited in *Robertson and others v. Hamilton*, B. R. M. 52 Geo. III.

(*t*) *Hobbs v. Hannam*, 3 Campb. 93.

(*u*) *Stockdale v. Dunlop*, 6 M. & W. 224.

(*v*) *The Royal Exch. Ass. Comp. v.*

M'Swinney, 14 Q. B. 634; 19 L. J., Q. B. 222. See also *Halhead v. Young*, 6 E. & B. 312; 25 L. J., Q. B. 290.

(*x*) *Smith v. Reynolds*, 25 L. J., Ex. 327.

(*y*) *De Mattos v. North*, L. R., 3 Ex. 185; 37 L. J., Ex. 116.

(*z*) *Wood v. Dwarries*, 25 L. J., Ex. 129.

had, he could not recover upon a policy describing them as bills of exchange (a).

X. Evidence.

Damages, p. 962.

In order to support his action, the plaintiff must be prepared with the following proofs, if put in issue by the pleadings (b):—1. The policy must be produced in evidence, and the subscription of the defendant must be proved. 2. Evidence must be given of the interest of the insured in the subject-matter of the insurance at the time of the loss (c). In insurances upon ships, the mere fact of the possession of the assured, as owners, is sufficient *prima facie* evidence of ownership (d), without the aid of any documentary proof or title-deeds on the subject, such as the bill of sale or ship's register, unless such further evidence is rendered necessary in support of the *prima facie* evidence of ownership, in consequence of the adduction of some contrary proof on the other side. As in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, and it was proved by the plaintiffs, that the ship had been paid for by all the four partners; but the defendant having produced the register, wherein the ship was registered in the names of two of the partners only; it was held, that as the title to freight arose only from ownership, and the register was conclusive evidence that only two were owners, and as there was not any count in the declaration stating the interest to be in two only, the plaintiffs could not recover (e). Although the production of the registry in which the plaintiff's name was omitted was thus conclusive evidence against him: its production with his name inserted was no evidence of his title (f). Now, however, by the Merchant Shipping Act, 1854, the register, or an examined or certified copy thereof, and also the certificate of registry, are *prima facie* proof of their contents (g). Where an action was brought on a policy of insurance on a ship, Lord *Kenyon*, C. J., was of opinion, that the proof of the assured having exercised acts of ownership, in directing the loading, &c., of the ship, and paying the people employed, was sufficient proof of interest (h). And in *M'Andrew v. Bell*, 1 Esp. N. P. C. 373, where the insurance was on a ship and her cargo, the plaintiff, in order to prove interest, produced the bill of

(a) *Palmer v. Pratt*, 3 Bingh. 185. As to the latter point, see *Hall v. Janson*, 4 E. & B. 500; 24 L. J., Q. B. 97.

(b) *Vide ante*, p. 926.

(c) *Clay v. Harrison*, 10 B. & C. 106.

(d) *Robertson v. French*, 4 East, 136. See also *Thomas v. Foyle*, 5 Esp. N. P. C. 88.

(e) *Camden v. Anderson*, 5 T. R. 709, recognized by *Le Blanc, J.*, in *Marsh v. Robinson*, 4 Esp. N. P. C. 98.

(f) *Pirie v. Anderson*, 4 Taunt. 652.

(g) 17 & 18 Vict. c. 104, s. 107.

(h) *Amery v. Rogers*, 1 Esp. N. P. C. 207.

lading, and the captain proved that it was his bill of lading, and that he had the goods specified in it on board; Lord *Kenyon*, C. J., held that the interest was sufficiently proved. Where the plaintiffs declared on a policy of assurance and averred that they were the persons residing in *Great Britain who received the order for* and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the ship called *The Ann*, or *ships*, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the *Herald*, the ship mentioned in the letter (*i*). In insurances upon goods, the mere production of a bill of parcels from the seller abroad, with the receipt to it, and proof of his handwriting, has been held to be sufficient proof of the interest of the assured (*j*). In a declaration on a policy of insurance effected by the plaintiff as agent of A. and B., it was averred, "that A. and B., at the time of effecting the policy, and thence until the time of the loss, were interested in the goods insured, to a large amount, to wit, to the amount of all the money ever insured thereon." At the trial, it appeared that, at the time when the policy was effected, another person was jointly interested in the goods, together with A. and B. The court were of opinion, that although A. and B. had not an exclusive interest, yet they had such an interest as would answer the terms of the averment: *Chambre*, J., observing that the averment in substance was nothing more than that the parties for whose benefit the assurance was made had an interest in the subject of that insurance. They were not bound by the terms of the averment to show anything more than that they had an interest; and if they had shown an interest to the extent of one hundredth part of the cargo, it would be sufficient. The spirit of the stat. 19 Geo. II. only required that the policy should not be a gaming policy (*k*).

3. It must be proved, that the loss happened in the same manner as is stated in the declaration, that the underwriter may be apprized of the case which he has to encounter by evidence. Goods were insured at and from *Mogadore* to *London*. The declaration averred, "that after the loading the goods, the ship departed on her intended voyage, and while in the course of her said voyage was lost by perils of the sea." It was held, that this was a material allegation; and therefore, the ship having been lost while at her moorings, and before the cargo was completed, the insured could not recover (*l*).

(*i*) *Bell v. Janson*, 1 M. & S. 201.

(*j*) *Russel v. Boheme*, Str. 1127, per Lee, C. J.

(*k*) *Page v. Fry*, 2 B. & P. 240. But see *Bell v. Ansley*, 16 East, 141, recog-

nized in *Cohen v. Hannam*, 5 Taunt. 108.

(*l*) *Abitbol v. Bristow*, 2 Marsh. Rep. 157; 6 Taunt. 464.

Where a loss is averred to be by *perils of the sea*, and some of the goods insured are spoiled, and others saved, the expenses of the salvage may be given in evidence (without stating them specially) on this averment, as being a damage within the cause of action as laid (*m*). And if the approximate cause of the loss be in consequence of the perils insured against, that is sufficient, although the remote cause be the negligence of the master or crew (*n*).

If a total loss of the ship is stated in the declaration, and damages laid accordingly, evidence of a partial loss may be received, and the plaintiff may recover to the amount of such loss as he is able to prove (*o*). A plea of fraudulent concealment does not, even in the case of a valued policy, admit more than a partial loss (*p*). Under an averment, that after loading the cargo, the ship sailed on the voyage, and was lost, the plaintiff cannot recover on proof that the ship, before she had half of her cargo on board, was driven from her moorings and lost (*q*). In an action upon an insurance upon profits, the assured must prove a loss: for where, upon an insurance of profits of a cargo of slaves, valued at 400*l.*, the plaintiff declared for a total loss by perils of the sea, and it appeared that the vessel was wrecked, whereby many of the slaves were lost, but the remainder got into the market, and were there sold; it was held, that, although the produce of the slaves sold did not give a profit upon the whole adventure, the plaintiff was not entitled to recover, because it did not appear, that if there had been no shipwreck, and all the slaves had got to market any profit would have been produced (*r*).

It is a general rule, that nothing which depends on the proceedings of a court can be proved by parol testimony (*s*); hence, in cases of capture and recapture, neither the salvage, nor the expenses incurred for ascertaining the amount of the salvage, can be otherwise proved than by producing the proceedings of the Admiralty Court. The copy of a sentence of condemnation of a ship or cargo in a foreign admiralty court is not made admissible evidence for the underwriters, by being handed over to them, by the assured, along with other papers, to satisfy them of the loss (*t*).

A slip of paper, wherein the names of the underwriters were mentioned, in the order in which they had originally been applied to, and had agreed to underwrite (and which was different from that in which their names appeared on the policy), having been tendered in evidence to show the true order of the names, for the purpose of letting in evidence of a false representation made to the first underwriter in fact; the court were of opinion, that such paper could not be received in evidence, for want of a stamp,

(*m*) *Cary v. King*, Ca. Temp. Hardw. B. R. 304.

(*n*) *Redman v. Wilson*, 14 M. & W. 482, *ante*, p. 881.

(*o*) *Gardiner v. Croasdale*, 2 Burr. 904.

(*p*) *King v. Walker*, 2 H. & C. 400.

(*q*) *Abitbol v. Bristow*, 6 Taunt. 464.

(*r*) *Hodgson v. Glover*, 6 East, 316.

(*s*) *Thellusson v. Shedden*, 2 N. R. 228.

(*t*) *Flindt v. Atkins*, 3 Campb. 215.

the effect of the evidence being to show, through the medium of writing, that the contract entered into between the parties was different from that which it appeared to be on the face of the policy (*u*).

In a case where it appeared that a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, and the secretary was examined, who said that he had, as he believed, thrown it aside among the waste papers of his office, and did not know what was become of it; that he had afterwards searched for, but did not recollect the finding it, and thought that he had not found it: it was held, that this was reasonable and proper evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time, and the attention of the witness not having been then called particularly to the circumstances: and further, that the witness might speak to the contents of the licence from memory, though he had made an entry of it in his memorandum-book for the private information of himself and the governor, which book was not produced, he having given it to the governor, who was gone abroad without returning it to him; for such book, if in court, would not have been evidence *per se*, but could only have been used by the witness to refresh his memory (*v*).

When a ship insured is captured in a voyage to an enemy's country, and the British licence legalizing the voyage is lost; to show that she had such a licence it is necessary to prove the loss of the paper purporting to be a licence put on board the ship, and to produce examined copies of the order in council for granting the licence and of the copy of the licence preserved in the secretary of state's office (*w*). To support an averment in a declaration on a policy of insurance on goods, "that the ship, with the goods on board, when at A. was arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained, and confiscated;" it is enough to show, that the goods were forcibly taken on board the ship by the officers of government, and never delivered to the consignees; without putting in any sentence of condemnation (*x*).

To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port (*y*). The production of a letter dated abroad, and

(*u*) *Marsden v. Reid*, 3 East, 572.

(*v*) *Kensington v. Inglis*, 8 East, 273.

(*w*) *Eyre v. Palsgrave*, 2 Campb. 605.

(*x*) *Carruthers v. Gray*, 3 Campb. 142,

Lord Ellenborough, C. J.

(*y*) *Arcangelo v. Thompson*, 2 Campb. 620.

addressed to J. S. in England, with the English ship-letter post-mark upon it, which directed a policy to be effected, is sufficient to prove that J. S. was "the person residing in Great Britain who received the order for, and effected, such policy" (z).

In an action on a policy on a voyage "to any port in the Baltic," evidence was admitted to prove that the Gulf of Finland is considered, in mercantile contracts, as within the Baltic, although the two seas are treated as separate and distinct by geographers (a).

Upon a question concerning the seaworthiness of a ship, after the evidence of persons who have examined her condition, experienced shipwrights, who never saw her, may be called on to say whether, upon the facts sworn to, she was, in their opinion, seaworthy or not, in conformity to the rule of evidence, that where a matter of skill or science is to be decided the jury may be assisted by the opinion of persons peculiarly acquainted with it from their professions or pursuits (b).

The opinion of the underwriters as to the materiality of communicating information as to a particular fact, previously to the effecting a policy, is not admissible in evidence. The materiality of such a communication is a question for the jury (c).

The plea of alien enemy, which goes merely in disability of the person, must be supported by the strictest proof. Hence, it is not sufficient merely to show that some time *before* action was brought, the party was domiciled in a territory which has become hostile, without showing that he was a native of that territory, or living there, at the time of action brought (d).

Damages.—By stat. 3 & 4 Will. IV. c. 42, s. 29, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

XI. *Premium—Return of.*

The general rule is, that the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for the loss (e).

(z) *S. C.*

(a) *Uhde v. Walters*, 3 Campb. 16. See *Moxon v. Atkins*, 3 Campb. 200.

(b) *Beckwith v. Sydebotham*, 1 Campb. 116.

(c) *Campbell v. Rickards*, 2 Nev. & M.

542; 5 B. & Ad. 840.

(d) *Harman v. Kingston*, 3 Campb. 153.

(e) *Per Lord Tenterden*, C. J., *Scott v. Irving*, 1 B. & Ad. 612.

In cases where the contract of insurance is void, as on the ground of non-compliance with a warranty, *e. g.* to sail with convoy, seaworthiness or the like, and fraud cannot be imputed to the assured, the assured will be entitled to a return of premium; because, where the contract does not attach, there is not any risk. "If the risk be not run, though it be by neglect, or even by *fault*, of the insured, yet the insurer shall not retain the premium" (*f*). "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned; *because a policy of insurance is a contract of indemnity*. The underwriter receives a premium for running the risk of indemnifying the assured, and to whatever cause it be owing, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it" (*g*).

An insurance was effected on the 12th of April, on a cargo of cotton, then at sea, by five several policies, at fifty guineas per cent.; and on the 13th, news of the vessel's safety having arrived, a further insurance was *bond fide* effected by six different policies, at ten and five guineas per cent. The latter insurance added to the former exceeded in amount the value of the subject-matter insured, but the former of itself did not; it was held, that the assured were entitled to a return of premium on the amount of the over insurance to which the underwriters who subscribed the policies of the 13th April were to contribute rateably, in proportion to the sums insured by them respectively (the amount of over insurance to be ascertained by taking into account all the policies), but that no return of premium was to be made in respect of the policies effected on the 12th (*h*).

Where there is an insurance on ship and freight, and the ship has arrived in safety, and earned freight, the assured cannot afterwards claim a return of premium, on the ground that he had no insurable interest, on account of a defect in his title to the ship (*i*). In cases where the risk is entire, and has once commenced, there shall not be any return or apportionment of premium (*k*). But upon an insurance at and from a place, if an usage can be proved warranting a division of the risk, the insured will be entitled to an apportionment of the premium, in case one of the risks be not run (*l*). A ship was insured "at and from London to any port or place, for twelve months, at 9*l.* per cent., warranted free from capture by the Americans." The ship sailed from the port of London, and was taken by an American privateer about two months

(*f*) *Per Lord Mansfield*, C. J., in *Stevenson v. Snow*, 3 Burr. 1240.

(*g*) *Per Lord Mansfield*, C. J., in *Tyrie v. Fletcher*, Cowp. 668.

(*h*) *Fisk v. Masterman*, 8 M. & W. 165.

(*i*) *M'Culloch v. Royal Exch. Ass. Co.*,

3 Campb. 406.

(*k*) *Tyrie v. Fletcher*, Cowp. 668; *Meyer v. Gregson*, B. R. East, 24 Geo. III., Marsh. 529.

(*l*) *Long v. Allan*, B. R. E. 25 Geo. III., Marsh. 570, *post*, p. 966.

afterwards. It was contended, that a proportionate part of the premium ought to be returned; that 9*l.* was much more than adequate to the risk actually run, *viz.* only two months. But the court were of opinion that there ought not to be a return of premium; Lord *Mansfield*, C. J., observing, "that there were two general rules established, applicable to the question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned; *because a policy of insurance is a contract of indemnity.* The underwriter receives a premium for running the risk of indemnifying the insured; and to whatever cause it be owing, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it. 2nd. Another rule is, that if that risk of the contract of indemnity has *once* commenced, there shall be no apportionment, or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet if it has commenced, though it be only for twenty-four hours or less, the risk is run, the contract is for the whole entire risk, and no part of the consideration shall be returned" (*m*).

A ship, employed in the coasting trade, was insured against capture for twelve months, at 15*s.* per cent. per month, 18*l.* The ship was lost in a storm, within the first two months. An action having been brought for the amount of the premium (18*l.*), the defendant pleaded non-assumpsit as to all except 3*l.*, and as to that a tender. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other issue, for the sum of 15*l.* subject to the opinion of the court, whether he was entitled to recover that sum of 15*l.*, or the sum of 3*l.* only. It was contended, on the part of the defendant, that this was not one entire contract for a year, but an insurance from month to month for twelve months; if the policy had been for a year, or twelve months, and the *premium* a gross sum, *the court* could not have apportioned it, because the risk in one month might be greater than in another, but here the *parties* have apportioned the *premium*; that the insurance was the same as if there had been twelve policies for each month. But *per* Lord *Mansfield*, C. J., it is an insurance for twelve months, for one gross sum of 18*l.* They have calculated this sum to be at the rate of 15*s.* per month. But what was to be paid down? Not 15*s.* for the first month, and so from month to month; but 18*l.* at once (*n*). A ship with her cargo was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, at and thence to her port or ports of

(*m*) *Tyrie v. Fletcher*, Cowp. 668. The same rules were laid down by Lord *Mansfield*, C. J., in *Lorraine v. Thomlinson*,

Doug. 587.

(*n*) *Lorraine v. Thomlinson*, Doug. 585.

discharge in St. Domingo, and at and from St. Domingo back to Honfleur, at a premium of 11*l.* per cent." The ship sailed to A., but in this part of the voyage she was guilty of a deviation. It was contended, on the part of the plaintiff, that there ought to be an apportionment and return of premium; but the court were clearly of opinion that there ought not to be any return. Lord *Mansfield*, C. J., said, the question depends upon this: Whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks? for, by splitting the words, and taking "at," and "from," separately, it will make six; *viz.* 1. At Honfleur; 2. From Honfleur to Angola; 3. At Angola, &c. The argument must be, that if the ship had been taken between Honfleur and Angola, there must have been a return. By an implied warranty, every ship must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage: so that, if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable though she had not been so at Angola, &c.; but, according to the construction contended for on the part of the plaintiff, she must have been seaworthy, not only at the departure from Honfleur, but also when she sailed from Angola, and when she sailed from St. Domingo (o).

But if the insurance be in effect on two or more voyages, and one or more have not commenced, there shall be an apportionment and return of premium in respect of those voyages which have not commenced, as will appear from the following case:

An insurance was effected upon a ship at five guineas per cent., lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage (p). Before the ship arrived at Portsmouth the convoy was gone. Notice of this was immediately given by the assured to the underwriter, and at the same time he was also desired either to make the long insurance or to return part of the premium. The jury found that the usual settled premium from London to Portsmouth was one and one-half per cent., and that it was usual, in cases like the present, for the underwriter to return part of the premium, but the quantum was uncertain. It was stated, that the plaintiff made to the defendant an offer of allowing him to retain one and one-half per cent. for the risk from London to Portsmouth. It was held, that the plaintiff was entitled to recover such part of the premium as had been given for insuring the ship on the voyage from Portsmouth to Halifax; *Denison, J.*, observing, that it was most equitable that the defendant should retain the premium for such part

(o) *Bermon v. Woodbridge*, Doug. 781.

(p) *Stevenson v. Snow*, 3 Burr. 1237.

In Mr. J. Blackstone's report of this case, 1 Bl. R. 315, the words of the

policy are, "warranted to depart with convoy for the voyage," omitting the words "from Portsmouth."

of the voyage only as he had run the risk of; that the insured had a right to have the other part restored to him. And this was agreeable to the general principle of actions for money had and received to the plaintiff's use; where the defendant had no right to retain it, he must refund it. *Foster, J.*, added, that there was not any consideration for the remainder of the premium, *i. e.* for the voyage from Portsmouth to Halifax, wherein no risk was run by the insurer, who only insured the voyage with convoy; therefore he had no right to retain the premium for this. *Wilmot, J.*, said, that upon this policy there were two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties, and only one of the two voyages was made, the other not at all entered upon. It was a conditional contract, and the second voyage was not begun, therefore the premium must be returned; for upon the second part of the voyage the risk never took place. Lord *Mansfield, C. J.*, commenting on the preceding case in *Tyrie v. Fletcher*, Cowp. 669, observed, "that the first object of insurance was from London to Halifax; but if the ship did not depart from Portsmouth with convoy, then there was to be no contract from Portsmouth to Halifax: why then, the parties have said, 'We make a contract from London to Halifax, but, on a certain contingency, it shall only be a contract from London to Portsmouth.' That contingency happening, reduced it in fact, to a contract from London to Portsmouth only." All the judges, in delivering their opinion, laid the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages. And in *Bermon v. Woodbridge*, Doug. 790, the same learned judge observed, that in *Stevenson v. Snow*, there was a contingency specified in the policy, upon the not happening of which the insurance would cease. It depended on the contingency of the ship sailing with convoy from Portsmouth whether there should be an insurance from that place. This necessarily divided the risk, and made two voyages. And in *Loraine v. Thomlinson*, Doug. 587, Lord *Mansfield* again remarked, that *Stevenson v. Snow* was decided on the ground of there being two voyages. The next case in which an apportionment has been allowed is that of *Long v. Allan*, B. R. E. 25 Geo. III., 4 Doug. 276; Park, 797; Marsh. 529. There the terms of the policy were, "at and from Jamaica to London, warranted to depart with convoy." The ship sailed without any convoy. An express usage was found, that on insurances couched in the same terms with the policy in question, the premium had been returned, deducting one-half per cent. if the ship departed without convoy. The court decided in favour of the return of premium, on the ground of the usage.

In a case (*q*) where the policy was on ship, "at and from Hull to

(*q*) *Rothwell v. Cook*, 1 Bos. & Pul. 172.

Bilboa, warranted to depart from England with convoy ;" the ship sailed from Hull to Portsmouth, and thence departed with convoy, which not being direct for Bilboa, she afterwards left, and was captured : the warranty not having been complied with, the plaintiff would have been non-suited, but it was insisted that he was entitled to a verdict for the premium, which was found accordingly. On motion to set aside this verdict, *Eyre*, C. J., said, "The verdict now stands for the return of the whole premium ; and the question is, whether it should stand for the whole, for none, or for a part ? If for a part, I do not know how we are to settle it : it must depend on there being, or not being, some rule to be found to direct us in making the decision. Certain it is, that if the ship had been lost in coming round to Portsmouth, the underwriters would have been liable ; it is not, therefore, reasonable that they should have been so liable without retaining a proportion of the premium. You should inquire whether there is any rate of premium among the underwriters from Hull to Portsmouth, and whether the premium has ever been apportioned where there has been only one insurance, without distinguishing the different risks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned ; and, therefore, the present verdict must be set aside, and the case go to a new trial." Rule absolute. Where there is an agreement to return part of the premium, "if the ship arrived," the assured will be entitled to a return, in the event of an arrival of the ship at the port of destination, although it should appear that the ship has sustained a loss occasioned by a sea risk (*r*), or that the ship has been captured and recaptured, and the assured has been obliged to pay the salvage (*s*). But every arrival of the ship at the port of her destination is not an arrival within the fair construction of the agreement : such, for instance, as an arrival in possession of an enemy at a neutral port, to which she was insured, or an arrival at her port in England as the property of other persons after her capture. In short, it must be an arrival at the destined port in the course of her voyage (*t*). The captors of a ship and cargo effected an insurance : restitution was afterwards awarded to the owners (with the exception of a small part of the cargo) ; it was held, that the captors were not entitled to a return of premium : for they had possession of the property insured ; and if it were a legal capture, they were entitled ; if it were not, the Court of Admiralty might amerce them in the damages and costs (*u*). Policy at and from Gottenburgh to Riga upon goods and ship, beginning the adventure upon the goods from the loading thereof aboard the ship at Gottenburgh ; it appeared that there were not any goods laden at Gottenburgh,

(*r*) *Simond v. Boydell*, Doug. 268.

(*s*) *Aguilar v. Rodgers*, 7 T. R. 421.

(*t*) Adm. by *Kenyon*, C. J., *S. C.*

(*u*) *Boehm v. Bell*, 8 T. R. 154.

but only at London: it was held that as the risk upon the goods never commenced, the plaintiff was entitled to a proportional return of premium (*v*). In the preceding case, the adventure upon the goods is expressly mentioned to begin from the loading at Gottenburgh; but if the place had been omitted, the court would have intended a loading at the place whence the voyage commenced (*x*). The formal receipt in the policy is conclusive evidence of the receipt of the premium as between the assured and underwriter in an action for the return of the premium (*y*).

Where the assured or his agent (*z*) have been guilty of fraud, as where the assured knew that the ship was lost, at the time of effecting the policy, the premium cannot be recovered (*a*); and the same rule holds, where the contract of insurance is illegal (*b*), unless the assured was ignorant of the illegality at the time of effecting the insurance (*c*); or unless everything has been done by the assured which lay in his power to legalize the voyage (*d*); though the endeavour has failed; and although the adventure is never entered upon, yet there ought at least to be some formal renunciation of the contract before the bringing the action (*e*). If the language of the policy be large enough to comprise an illegal adventure, and the assured contemplated an illegal adventure, the underwriter is not entitled to sue for the premium (*f*). A policy broker is the agent of both the assured and underwriter, and is the trustee for the assured, as long as the policy remains in his hands, to adjust and receive returns of premium for him when the events have happened on which they are to be made. Hence the broker, having notice that the events have happened which entitle the assured to such returns, is authorized to deduct so much from the gross amount of the premiums, and to pay over the difference only to the underwriter (*g*). In *assumpsit*, on a policy of insurance, with a count for money had and received, the defendant had not paid any money into court. The defence was, that the ship was not seaworthy; on which point, without any direct evidence of fraud, the case was submitted to the jury. General verdict for defendant. *Note.* It was not intimated to the jury, that the plaintiff was entitled to a verdict for a return of premium; on an application to the court, it was held, that the plaintiff was entitled to a verdict for the premium on the count for money had and received; but the court hoped, that in future the counsel would in his opening demand the premium, in every case where it was intended to insist upon it on

(*v*) *Horneyer v. Lushington*, 15 East, 46.

(*x*) *Spitta v. Woodman*, 2 Taunt. 416.

(*y*) *Dalzell v. Mair*, 1 Campb. 532.

(*z*) *Chapman v. Frazer*, B. R. T. 33 Geo. III., Park, 329.

(*a*) *Tyler v. Horne*, London Sittings after H. T. 25 Geo. III., Lord Mansfield, C. J., Park, 329.

(*b*) *Lowry v. Bourdieu*, Dougl. 471, and cases in notes.

(*c*) *Oom v. Bruce*, 12 East, 225.

(*d*) *Hentig v. Staniforth*, 5 M. & S. 122.

(*e*) *Palyart v. Leckie*, 6 M. & S. 290.

(*f*) *Jenkins v. Power*, 6 M. & S. 282.

(*g*) *Shee v. Clarkson*, 12 East, 507.

failure of his claim for the loss (*h*). Where a total loss is recovered, there cannot be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price (*i*). Upon a mere misrepresentation without fraud, where the risk never attached, the assured is entitled to a return of the premium (*j*).

XII. Of *Bottomry* and *Respondentia*.

Bottomry.—An agreement entered into by the owner, or, under certain circumstances, by the master of a ship (*k*), whereby, in consideration of a sum of money advanced, (for the purpose of enabling the borrower to fit out the ship, or purchase a cargo for an intended voyage,) the borrower undertakes to repay the same with a stipulated interest, if the voyage shall terminate successfully, and binds himself and the ship and tackle for the due performance of the agreement, is termed *bottomry*. The term "*bottomry*" is derived from the original language of the agreement, which merely spoke of the keel or bottom of the ship; but the expression was always considered as being used figuratively, *viz. pars pro toto*. This agreement is sometimes made in the form of a deed-poll, called a bill of bottomry, executed by the borrower, and sometimes in the form of a bond with a penalty. "Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law '*periculi pretium*,' and no person can be entitled to it who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly, and in terms; it is sufficient that the fact can be collected from the language of the instrument considered in all its parts. It has been said, that such instruments, being the language of commercial men, and not of lawyers, should receive a liberal construction, to give effect to the intention of the parties" (*l*). An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship; for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry

(*h*) *Penson v. Lee*, C. B. M. 41 Geo. III., 2 B. & P. 330.

(*i*) *Per jury*, in *Langhorn v. Allnutt*, 4 Taunt. 511.

(*j*) *Feise v. Parkinson*, 4 Taunt. 640.

(*k*) In a foreign country, in the absence of the owners, and in cases of necessity, the master may take up money on bot-

tomry for the use of the ship; as where a ship, being on a voyage from Bengal to London, was obliged to put back to Bombay to repair.

(*l*) *Per Lord Tenterden*, C. J., delivering judgment, *Simonds v. Hodgson*, 3 B. & Ad. 50, on error from C. B.

bond (*m*). If the money so borrowed is made repayable in any event, and not dependent on the arrival of the ship, the lender has no insurable interest (*n*).

Respondentia.—If the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then by the terms of the agreement the borrower only personally is bound to answer the contract, who, therefore, in this case, is said to take up money at respondentia. Bottomry and respondentia differ very materially from a simple loan (*o*). 1. In the case of a loan, the money is at the risk of the borrower, and must be repaid at all events. But where money is lent on bottomry or respondentia, the money is at the risk of the lender during the voyage. 2. By stat. 7 Geo. I. c. 21; s. 2, "all contracts and agreements made or entered into by any of his Majesty's subjects, or any person or persons in trust for them, for the loan of any money by way of bottomry on any ship or ships in the service of foreigners, and bound to or designed to trade in the East Indies, are void." By stat. 19 Geo. II. c. 37, s. 5, "all money lent on bottomry, or at respondentia, upon ships belonging to any of his Majesty's subjects bound to or from the East Indies, must be lent only on the ship, or upon the merchandize on board, and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender, who alone shall have a right to make insurance on the money so lent; and no borrower of money shall receive more than the value of his interest in the ship, or in the effects laden on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or the effects on board, does not amount to the full sum or sums he has borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he has not laid out on the ship or merchandize laden thereon, with lawful interest for the same, in the proportion the money laid out shall bear to the whole money lent, notwithstanding the ship or merchandize shall be totally lost."

XIII. Insurance upon Lives.

The insurance of life is a contract whereby the insurer (*p*), in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay to the person for whose benefit

(*m*) *Thompson v. The Royal Exch. Ass. Comp.*, 1 M. & S. 30.

(*n*) *Stainbank v. Shepherd*, 13 C. B. 418.

(*o*) Marsh. 575. As to the power of the master to hypothecate, see *Benson v.*

Duncan, 3 Exch. 655; 18 L. J., Exch. 172, and judgment of *Jervis*, C. J., in *Stainbank v. Fenning*, 11 C. B. 88; and of *Parke*, B., in *Stainbank v. Shepherd*, 13 C. B. 44.

(*p*) Marsh. 771. (3rd ed.)

the insurance is made a stipulated sum of money, or an annuity equivalent, upon the death of the person whose life is insured, *when-ever this shall happen*, if the insurance be for the whole life; or *in case it shall happen within a certain period*, if the insurance be for a lesser term than for life. "The contract commonly called 'life assurance,'" says *Parke, B.*, "when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity" (*q*).

The making insurances on lives, or other events, wherein the insured had no interest, having introduced a mischievous kind of gaming, it was enacted, by stat. 14 Geo. III. c. 48; first, "That no insurance should be made by any person, body politic or corporate, on lives, or *any other event*, wherein the person for whose benefit or on whose account the policy is made, has no interest, or by way of gaming or wagering. 2ndly. That in every policy on lives, or other events, the name of the person interested, or on whose account it is made, must be inserted. 3rdly. That no greater sum should be recovered or received from the insurer, than the amount of the interest of the insured." In a policy on the life of another, the omission or erroneous statement of the person interested avoids the policy (*r*). Whether the insured has an interest within the meaning of the preceding statute, is sometimes the subject of litigation; as to which, it has been held, that a creditor has an insurable interest in the life of his debtor, at least where he has only the personal security of the debtor (*s*). Although where the insurance is really effected by the person insured, the mere circumstance that another person pays the premiums may not be conclusive, or even, *per se*, sufficient to prove that the interest was not in the insured; yet if the insurance be effected by the person nominally insured, at the instance of and for the benefit of another, who is to pay the premiums, and in pursuance of an arrangement between them, under which he immediately secures the sole benefit of it,—this is conclusive that the interest is really in such third person (*t*). If the insured had an interest at the time the

(*q*) *Dalby v. The India and London Life Assurance Comp.*, 15 C. B. 365.

(*r*) *Hodson v. The Observer Life Assurance Society*, 26 L. J., Q. B. 303; and see *Shilling v. Accidental Death Insurance Comp.*, 26 L. J., Exch. 266.

(*s*) *Anderson v. Edie*, Hil. 1795, *per Lord Kenyon*, C. J., at N. P., Park, 915.

In *Read v. Royal Exch. Ass. Comp.*, Lord Kenyon was of opinion, that a wife making an insurance on her husband's life need not prove that she was interested therein, for it must be presumed. See Peake's Additional Cases, p. 70.

(*t*) *Triston v. Hardey*, 14 Beav. 232; *Shilling v. Accidental Death Insurance*

policy was effected, it is sufficient; although the interest ceased before the death of the *cestui que vie* (u).

The word "interest," in the foregoing statute, means pecuniary interest in the life or event insured; hence a policy effected by a father in his own name, on the life of his son, the father not having any pecuniary interest therein, is void (x). Where the debt accrues by virtue of an illegal security, as a note for money won at play, such interest is not insurable (y). In an action on an insurance on the life of J. S. for one year, and during the life of the plaintiff, but in case the plaintiff should die before J. S., the policy to be void; it appeared that J. S. had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having appointed the plaintiff executor of his will, and directed him to make assurance. It having been objected, that the insurance was made by a person not having any beneficial interest, Lord *Kenyon*, C. J., held this to be a sufficient interest to support the action; observing, that the plaintiff could not assent to the legacy before the testator's debts were paid, without being guilty of a *devastavit*; and, being executor, all the interest of the testator vested in him. The cause proceeded; but it appearing that J. S. was in a dying state when the policy was effected, the defendant had a verdict (z).

Before a policy of insurance upon a life is effected, it is usual for the party (whose life is the object of the insurance) to subscribe a written declaration, touching his age, state of health, (*e. g.* whether he has ever had the small-pox, gout, &c.,) and other circumstances. The substance of this declaration is recited, and the whole is incorporated by reference in the policy: at the end of which a proviso is usually inserted, declaring the policy to be void in case the insured should die upon the seas, or go beyond the limits of Europe, without leave obtained from the directors (a), or commit suicide, or die by the hands of justice, or if the age of the assured exceed years, or if the assured be afflicted with any disorder which tends to the shortening of life; or in case the declaration should contain any averment which is not true. This last stipulation is not restricted to the meaning of being "true" within the knowledge of the party making the statement; such knowledge is immaterial (b). Such are the conditions which are usually required, varied, however, according to the regulations of the different insurance companies.

Comp., 26 L. J., Exch. 266; 27 L. J., Exch. 16.

(u) *Dalby v. The India and London Life Assurance Comp.*, 15 C. B. 315, overruling *Godsall v. Boldero*, 9 East, 72.

(x) *Halford v. Kymer*, 10 B. & C. 724.

(y) *Dwyer v. Edie*, London Sittings after H. T. 1788, *Buller*, J., Park, 914.

(z) *Tidswell v. Ankerstein*, Peake's N. P. C. 161.

(a) This leave is usually granted upon a condition to pay an extra premium for the extra risk. As to the construction to be put upon such a condition, see *Notman v. Anchor Assurance Comp.*, 27 L. J., C. P. 275.

(b) *Duckett v. Williams*, 2 Cr. & M. 348, *Hope Assurance Comp.*

The policy of imposing these terms is obvious: for if there be not any warranty or condition on the part of the insured, the insurer is subject to all risks, unless he can show that there has been a fraudulent concealment or suppression of the truth (c). Where to an action on a policy of insurance, which was set out and recited that the plaintiffs had made a proposal, by which they declared that the life to be assured had not had certain specified diseases, and that, thereupon, the defendants had undertaken the assurance; it having been pleaded that the declaration of the plaintiffs was untrue, and that the life had some of the diseases, and the jury found that the life had had the diseases: it was held, by the Court of Exchequer Chamber, overruling the Court of Queen's Bench upon this point, that the plaintiffs were entitled to a verdict: their declaration not being in the nature of a condition precedent to their right to recover, but a representation only, which would not avoid the policy unless it were not only false but fraudulent (d).

It is the duty of the assured to disclose all material facts within their knowledge; and the proper question for the jury is, whether, in their opinion, the facts be material, and not whether the party believed them to be so (e). In an assurance upon the life of another, one condition of the policy being in effect that the assured guarantees the truth of what the life or referees have said, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is not acquainted with the life insured, and although the agent of the insurance-office undertakes to do all that is required by his office (f). But the life and referees are not always the agents of the person insuring the life, and where they are not, their false representations will not avoid the policy (g). In a case where the conditions required a declaration of the state of the health of the assured, and the policy was to be valid only if the statements were free from all misrepresentation and reservation: and the declaration described the assured as resident at Fisherton Anger: whereas, the assured was then a prisoner in the county gaol for Wilts, there; it was held, that it was a question for the jury,

(c) *Stackpole v. Simon*, per Lord Mansfield, C. J., H. T. 1779, Park, 932.

(d) *Wheelton v. Hardisty*, 27 L. J., Q. B. 241. In this case the plaintiffs replied an equitable replication that the policy was effected upon the faith of a prospectus issued by the defendants, which stated that all assurances effected with them were unquestionable, unless fraud was practised in obtaining them, and denying fraud; but it was held by the majority of the judges of the Queen's Bench that the proof of the circulation of such a prospectus was no evidence from which

the jury could presume that the plaintiffs had seen the prospectus, and effected the policy on the faith of it. 26 L. J., Q. B. 265; and see *Wood v. Dwarries*, 11 Exch. 493; *S. C.* 25 L. J., Exch. 129.

(e) *Lindenau v. Desborough*, 8 B. & C. 586, cited by *Parke, B.*, in *Wainwright v. Bland*, 1 Tyr. & Gr. 420. See also *Jones v. The Provincial Insurance Comp.*, 26 L. J., C. P. 272.

(f) *Everett v. Desborough*, 5 Bingh. 503; *Foster v. Mentor*, 3 E. & B. 62.

(g) *Wheelton v. Hardisty*, 26 L. J., Q. B. 265.

whether the imprisonment were a material fact and ought to have been communicated (*h*). False representation, in answer to parol questions not comprised in list of printed questions, will avoid the policy (*i*). Where, however, the declaration of the assured, which formed the basis of the insurance, was, that he was not aware of any disorder tending to shorten life; it was held, that this referred not merely to the knowledge of the assured of the disorder, but also to his knowledge that it tended to shorten life; and therefore, that his being aware at the time of making the declaration that he had certain illnesses which did, in fact, tend to shorten life, he not knowing that they had such tendency, did not avoid the policy (*j*).

It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life is a disorder tending to shorten life within the meaning of the declaration, from the mere circumstance that he afterwards dies of it, if it be not a disorder which generally has that tendency, as where the disorder was dyspepsy (*k*). J. S. was warranted in good health at the time of making the policy. In an action on the policy, it appeared, that in consequence of a wound which J. S. had received in battle many years before, and which had occasioned a partial relaxation or palsy, he could not retain his urine or fæces. This had not been mentioned to the insurer. J. S. died of a fever. It was proved by several physicians and surgeons that the wound had not any connection with the fever, that the want of retention was not a disorder that shortened life, and that the party might, notwithstanding, have lived to the common age of man. Lord *Mansfield* told the jury that the only question was, whether the party was in a reasonable good state of health, and such a life as ought to be insured on common terms. The jury, upon this direction, found a verdict for the plaintiff (*l*). A warranty that the party is in a good state of health will not be falsified by showing that he was troubled with spasms and cramps, and violent fits of the gout (*m*): *aliter*, if subject to spitting of blood, consumptive symptoms, &c. (*n*). Where it was provided that if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented, or if any fraud should have been practised on the insurers, or any false statements made to them, in or about the effecting of the insurance, the policy should be null and void, and all monies paid by or on behalf of the insurer on account of the policy should become forfeited; it was held, that the policy was avoided by any misstatement or misrepresentation of a

(*h*) *Huguenin v. Rayley*, 6 Taunt. 186.

(*i*) *Wainwright v. Bland*, 1 Tyrw. & Gr. 417.

(*j*) *Jones v. The Provincial Insurance Comp.*, 26 L. J., C. P. 272.

(*k*) *Watson v. Mainwaring*, 4 Taunt. 763.

(*l*) *Ross v. Bradshaw*, 1 Bl. R. 312.

(*m*) *Willis v. Poole*, at N. P., 1780, Marsh. 774, 3rd ed.

(*n*) *Geach v. Ingall*, 14 M. & W. 95.

material fact, whether known or not known to be untrue by the party making it, but that the premiums were not forfeited unless the statement was fraudulent and false to the knowledge of the party making it; that the words "false statements," taken in connection with the word "fraud," must be taken to mean such false statements as were wilfully false, known to be untrue by the party making them, and used with intent to deceive and perpetrate fraud (o). The receipt of premiums by the insurer, after a knowledge of a breach of the conditions of the policy by the assured, will operate as a waiver of the forfeiture (p).

Where there is no express provision in the policy that in the event of the assured dying by his own hands the policy shall become void, suicide whilst in a state of temporary insanity will not avoid the policy, but suicide whilst in a sound state would vacate it, and so would death by the hands of justice, or in a duel.

Horn effected a policy on his own life for 300*l*. The policy contained no provision that the assurance should be void in case of suicide. Horn committed suicide whilst in a state of temporary insanity:—Held that there was no principle of public policy by which the policy should be void (q). Fauntleroy insured his life for a certain sum at the Amicable Assurance Office in 1815. In the same year he committed a forgery. He continued to pay the annual premium on the amount insured, up to 1824, when he was apprehended on the charge of forgery. On the 29th of October, in the same year, he was declared a bankrupt, and an assignment of his property was made to the defendants. In November following Fauntleroy was executed. It was adjudged that the assignees were not entitled to recover; Lord *Lyndhurst*, C., observing, that if a party effected an insurance for life, on condition that the sum insured should be *paid* in case of suicide, or death by sentence of the law, such contract would be void, as being contrary to public policy, by taking away the restraint of public crimes; then if such condition were void when expressed, on what principle could it be sustained if it had no other foundation than a mere inference? (r).

A life policy of insurance contained a proviso (*inter alia*) that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned; upon an issue whether the assured died by his own hands, the jury found that he "voluntarily threw himself into the water, knowing

(o) *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

(p) *Wing v. Harvey*, 23 L. J., Chan. 511; and see as to estoppel by the conduct of the insurers, *Simpson v. The Accidental Death Insurance Comp.*, 26 L.

J., C. P. 289.

(q) 30 L. J., 511, Ch.

(r) *Amicable Assurance Society v. Boland and others*, D. P. July 9, 1830, reversing judgment of M. R., 4 Bligh, N. S. 194; 2 Dow. & Cl. 1.

at the time that he should thereby destroy his life, and intending thereby to do so ; but that at the time of committing the act he was not capable of judging between right and wrong ;" it was held (*Tindal*, C. J., dissentiente), that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisoes to the acts of felonious suicide (s). Life policies often contain a condition that they shall be void in case the "assured should die by his own hands, or by the hands of justice, or in consequence of a duel," with a proviso that "if any third party have acquired a *bonâ fide* interest therein by assignment, or by legal or equitable lien, for a valuable consideration or as security for money, the assurance shall nevertheless, to the extent of such interest, be valid and of full effect." This proviso is perfectly legal (t). The assignees of a bankrupt, the assured, are not third parties, &c., within the meaning of the proviso (u).

Where a policy is to continue, provided that the *assured* pay the premium within twenty-one days of its falling due, this does not give the executors the right to pay it after his death, even though tendered within the twenty-one days (x).

On a covenant with an insurance company to keep up a policy in their office as security for money lent by them, the policy having been dropped after the first year, and the principal sums and interest having been recovered by judgment, the measure of damage is not the premiums which would have been payable to the company had the policy been kept up, but the real amount of injury, if any, which has been sustained, either through the loss of the security or the expenses incurred in effecting another insurance (y).

XIV. Insurance against Fire.

By this contract the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against any loss or damage which he may sustain in his houses or other buildings, goods, and merchandize, by fire, during a limited period of time (z).

(s) *Borradaile v. Hunter*, 5 M. & Gr. 639 ; 5 Scott, N. R. 418 ; *acc. Clift v. Suabe*, 3 C. B. 476 ; 17 L. J., C.P. 2.

(t) *Moore v. Wolsey*, 24 L. J., Q. B. 40.

(u) *Jackson v. Forster*, 1 E. & E. 463, in error.

(x) *Simpson v. The Accidental Death Insurance Comp.*, 26 L. J., C. P. 289. See also *Pritchard v. Merchants' and Trades-*

men's Assurance Comp., 26 L. J., C. P. 169 ; and see *post*, p. 978, 9. As to what amounts to a payment of the premium between two insurance companies having cross accounts with each other, see *Prince of Wales Assurance Comp. v. Harding*, 27 L. J., Q. B., 297.

(y) *The National Assurance Comp. v. Best*, 27 L. J., Exch. 19.

(z) Marsh. 785, 3rd ed.

A policy of insurance against fire is a contract which is not in its nature assignable (a); it is merely a special agreement with the person insuring that the insurer will indemnify him against such loss or damage as he may sustain. The policy, however, may, and frequently is, assigned with the consent of the insurer. It is necessary that the insured should have an interest or property at the time of insuring, and at the time the fire happens; and in case of loss, the insured can only recover to the extent of his interest, insurances against fire being within the stat. 14 Geo. III., c. 48 (b).

The contract of insurance being one of perfect good faith, if the assured makes a wilfully false and fraudulent claim, he forfeits all claim and cannot recover the real value of the goods consumed (c).

The stat. 14 Geo. III. c. 78, s. 83 (Party Wall Act), where the house insured, situate within the limits of the act, is burnt down, gives any person interested a right to insist upon the insurance money being laid out in rebuilding. A. bought a house on a bad title and insured; B. recovered in ejectment, but before possession delivered, the house was burnt down; it was held that B. had a right to insist on the money being laid out in rebuilding (d).

The form of the policy used by the different companies is nearly the same. The principal difference consists in the articles of the printed proposals, which are incorporated by reference with the policy, and are to be considered as part of the contract (e). By the printed proposals of a fire insurance company it was stipulated, "that the insured should procure a certificate of the minister, &c. of the parish, importing that they knew the character of the insured, &c.;" it was held that the procuring such certificate was a condition precedent to the right of the insured to recover; and that supposing the minister, &c. had wrongfully refused to grant such certificate, it would not vary the case, the rule being that if a person undertake for the act of a stranger, that act must be done (f). The policy usually provides that "no loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by the insurer." The words "usurped power," in the proviso, mean an invasion from abroad,

(a) *Per Lord King, Ch., in Lynch v. Dalzell*, 3 Bro. P. C. 497, but in *Tomlins' Edit.* 4 Bro. P. C. 431.

(b) *Per Lord Hardwicke, in The Saddlers' Company v. Badcock*, 2 Atk. 555. See the statute in the preceding section, p. 971, and *Marks v. Hamilton*, 7 Exch. 323.

(c) *Britton v. The Royal Insurance Comp.*, 15 L. J. 73, *Willes, J.*

(d) *Pearce v. Watts*, B. R. Trin. 20 Geo. III., B. P. B. 97; *Dampier MSS.*, L. I. L.

(e) See *Routledge v. Burrell*, 1 H. Bl. 254.

(f) *Worsley v. Wood*, 6 T. R. 710. See also *Oldman v. Bewicke*, 2 H. Bl. 577, n., to the same effect.

or an internal rebellion, not the power of a common mob (*g*). The Sun Fire-office, in the year 1727, introduced into the preceding exception the words "*civil commotion*," by reason of which it was held, that the office was not liable for a loss sustained by the plaintiff, whose house and distillery were set on fire by the mob during the riots in the year 1780 (*h*). If a person who is not a linen-draper, insures "his stock in trade, household furniture, *linen*, wearing apparel, and plate," by a policy against fire, this will not protect linen-drapery goods subsequently purchased on speculation; and the word *linen* in the policy must be confined to household linen, or linen used by way of apparel (*i*). A person residing abroad, having two warehouses, wrote to this country to effect an insurance upon one of them *only*, without stating, as was the fact, that a house nearly adjoining to it had been on fire on the day he wrote, and that there was danger of the fire again breaking out. The fire having broken out again on the day next but one following, and consumed the warehouse; it was held that this was a material concealment, although the letter was written without any fraudulent intention (*j*). A policy of insurance (against fire) was effected on the stock and utensils of a sugar-house, the different stories of which were heated by a chimney running up to the top. By the negligence of the plaintiff's servants, in omitting to open the register, the heat was considerably increased, by means of which large quantities of the sugar were spoiled; but no damage was occasioned to anything but the sugar, and no greater fire existed than on ordinary occasions; it was held that this was not a loss *by fire* within the policy (*k*). In a policy of insurance against loss by fire, from half a year to half a year, the insured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year; and it was also stipulated, that no insurance should take place until the premium was actually paid: a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid; it was held that the insurers were not liable, though the insured tendered the premium before the end of the fifteen days, but after the loss (*l*). By a policy under seal, referring to

(*g*) *Drinkwater v. London Assurance Comp.*, 2 Wils. 363; *Wilmot*, 282, *S. C.* An assurance company having paid a loss occasioned by riots, may recover back such loss in an action against the hundred suing in the name and with the consent of the insured. *Mason v. Sainsbury*, E. 22 Geo. III. B. R., Marsh. 796 (3rd ed.) Recognized in *Clarke v. The Inhabitants of Blithing*, 2 B. & C. 254, and in *Yates v. Whyte*, 4 B. N. C. 272.

(*h*) *Langdale v. Mason*, Park, 657; Marsh. 689.

(*i*) *Watchorn v. Langford*, 3 Campb. 422.

(*j*) *Bufe v. Turner*, 6 Taunt. 338; 2 Marsh. Rep. 46, *S. C.*

(*k*) *Austin and another v. Drewe*, Holt's N. P. C. 126, C. B., *Gibbs*, C. J., and afterwards confirmed by the court, 6 Taunt. 436; 4 Campb. 360, *S. P.*

(*l*) *Tarleton v. Staniforth*, 5 T. R. 695. Judgment affirmed in Exch. Chamb., 1 B. & P. 471; and see *Simpson v. The Accidental Death Insurance Comp.*, 26 L. J., C. P. 289, *ante*, p. 976, where *Tarle-*

certain printed proposals, a fire-office insured the defendant's premises from 11th of November, 1802, to 25th of December, 1803, for a certain premium, which was to be paid yearly on each 25th of December, and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals it was stipulated, that the insured should make all future payments annually, at the office, within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premiums were paid; and by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there, by policies for a year or more, had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies; it was held, notwithstanding this latter clause (the insured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium), that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made; though the insured, after the loss, and before the fifteen days expired, tendered the full premium which had been demanded: for the effect of the whole contract, &c. taken together was only to give the insured an option to continue the insurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option, by giving notice that they would not renew the contract (*m*). In covenant against the defendants, who were members of the Sun Fire-office, a tender was pleaded and money paid into court, under the 19 Geo. II. c. 37, s. 7. It was objected, that the statute did not extend to insurances against loss by fire; but the court overruled the objection, on the ground that the statute was not necessarily confined to marine insurances; that it ought to be construed as extensively as the mischief, and there was as much reason to have money paid into court on a fire insurance as on any other (*n*).

Upon an insurance against fire there is an implied engagement that the assured will not afterwards alter the premises, so that they no longer agree with the description of them in the policy, and so that thereby the risk and liability of the insurer is increased. Thus, the converting the house insured from a house

ton v. Staniforth, and *Salvin v. James*, are commented upon. See also *Pritchard v. Merchants' and Traders' M. L. Ass. Society*, 27 L. J., C. P. 169; and *She-*

ridan v. Phoenix Life Assurance Comp., 28 L. J., Q. B. 94, in error.

(*m*) *Salvin v. James*, 6 East, 571.

(*n*) *Solomon v. Bewicke*, 2 Taunt. 317.

composed of two stories into a house composed of three stories, avoids the policy (o).

Insurance on a granary with a kiln for drying corn attached. By the third condition of the policy it was stated, that the trades carried on in the insured premises should be accurately described, and if a kiln or any process of fire had been used and not noticed in the policy, the policy was to be void; and by another condition, it was stated that if the risk to which the insured premises were exposed should be by any means increased, notice was to be given to the office, and allowed by indorsement on the policy. A cargo of bark having sunk near the premises of plaintiff, who was the insurer, he allowed the bark to be dried at his kiln, *gratis*; and in consequence of the fire at the kiln during this process, which lasted three days, the premises were burnt down. In an action against the insurance office, the jury having found that drying bark was a more dangerous trade than drying corn; it was held, first, that a user of the corn kiln for a different purpose from that intended at the time of making the policy, was not a misdescription or omission within the meaning of the third condition; secondly, that a single user of the corn kiln as a bark kiln, *gratis*, was not such an alteration or increase of risk as required notice to be given to the office; thirdly, that the two conditions taken together did not amount to a warranty that the plaintiff would not use the kiln for other purposes than drying corn; fourthly, that although the fire was occasioned by the negligence of the assured himself, he, not being guilty of fraud, might recover (p). It appears upon general principles, that a policy of insurance is not rendered void by an alteration in the use to which the premises are put after the execution of the policy (q).

The profits of a business may be insured, *quà* profits, but not under a general description, as "interest in the inn and offices" (r).

(o) *Sillern v. Thornton*, 3 E. & B. 882; 23 L. J., Q. B. 368.

(p) *Shaw v. Robberds and others*, 1 Nev. & P. 279; 6 A. & E. 75.

(q) *Per Tindal, C. J., in Pim v. Read*, 6 Scott's N. R., 1004. But see *Glen v.*

Lewis, 8 Exch. 617; 22 L. J., Exch. 238; and *Stokes v. Cox*, 26 L. J., Exch. 113.

(r) *In re Wright and Pole*, 1 A. & E. 621; 3 Nev. & M. 819.

CHAPTER XXVI.

LIBEL.

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I. *Of the Nature of a Libel, and in what Cases an Action may be maintained for this Injury.*

A LIBEL is a malicious defamation expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule (*a*). "If any man deliberately or maliciously publishes anything in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action lies against such publisher" (*b*). An action on the case is maintainable against any person who falsely and maliciously publishes any libel against another, or against a corporation aggregate, if the libel is published by their order (*c*). So an action is maintainable by a corporation against a shareholder for a libel (*d*). Where the natural tendency and import of the language used in the publication, is to defame and injure another, it is a libel, and actionable; for the law will presume, that the defendant, by publishing it, intended to produce that injury which it was calculated to effect. In such case, the judge ought to direct the jury, that it is malicious (*e*), and not leave it as a question to the jury to say, whether the defendant *intended* to injure the plaintiff: for every man must be presumed to intend the natural and ordinary consequences of his own act (*f*); in other words, where the imputations are false in fact, or

(*a*) *Digby v. Thompson*, 4 B. & Ad. 821; 1 Nev. & M. 485.

(*b*) *Per Wilmot*, C. J., 2 Wils. 403. See also *per Bathurst and Gould, JJ.*, in *S. C.*; *Wakley v. Healey*, 7 C. B. 591; and *Cheese v. Scales*, 10 M. & W. 488.

(*c*) *Whitfield v. The South Eastern Rail.*

Co., 27 L. J., Q. B. 229.

(*d*) *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & M. 87.

(*e*) See *post*, p. 987.

(*f*) *Haire v. Wilson*, 9 B. & C. 643; *Fisher v. Clement*, 10 B. & C. 472. See *Bromage v. Prosser*, 4 B. & C. 247.

without justifiable occasion, the law implies malice (*g*). As there is a difference between the malignity and injurious consequences of slanderous words spoken or written, the one being sudden and fleeting, the other permanent, deliberate, and disseminated with greater ease; many words, which, if spoken, would not be actionable, are actionable if published in the way of libel (*h*). In *Bradley v. Methwyn* (*i*), which was an action on the case for a libel, Lord *Hardwicke*, C. J., observed, that "the present case is not for words, but for a libel, in which the rule is different; for some words may be actionable, or prosecuted by way of indictment, if reduced into writing, which would not be so, if spoken only. For the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace, by making the scandal more public and lasting, and spreading it abroad; which was so determined in this court, in the case of *King v. Griffin*, Hil. 7 Geo. II." This subject was much discussed in *Thorley v. Earl of Kerry* (*j*), where a defamatory writing, imputing hypocrisy to the earl, and that he used religion as a cloak for unworthy purposes, was held to be actionable; Sir *James Mansfield*, who delivered the judgment, observing, that he was bound by the later authorities, although the distinction between speaking and writing was not to be found in Rolle's Abridgement, or the earlier editions of Comyns' Digest. Hence the word *swindler*, if *spoken* of another (unless it be spoken in relation to his trade or business) is not actionable (*k*); but if it be published in the way of libel, it is actionable (*l*). Hence, also, the publication of a letter containing some verses, in which the plaintiff was called an *itchy old toad*, was deemed a libel (*m*). So the publication of a *letter*, in which the plaintiff was stated to be one of the most infernal villains that ever disgraced human nature, has been held actionable, without proof of special damage (*n*).

A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel (*o*). So a dispute between an incumbent and a churchwarden as to the use of the vestry room is a lawful subject of public comment (*p*). So a fair, temperate, and reasonable criticism on the buildings of an architect, is not libellous, however mistaken in point of taste the opinion may be, or however unfavourable to the merits of the architect (*q*). In like manner, a

(*g*) *Darby v. Ouseley*, 1 H. & N. 1; *Stuart v. Lovell*, 2 Stark. 93.

(*h*) *Austin v. Culpepper*, 2 Show. 314; *King v. Lake*, Hardr. 470. *Per Hale*, C. B.

(*i*) B. R. 10 Geo. II. MSS.

(*j*) 4 Taunt. 355. The action was a common action on the case, not an action for *scandalum magnatum*.

(*k*) *Saville v. Jardine*, 2 H. Bl. 531. See *Wilby v. Elston*, 8 C. B. 142.

(*l*) *J'Anson v. Stuart*, 1 T. R. 748.

(*m*) *Villers v. Monsley*, 2 Wils. 403. As to whether such words, if spoken only, would be actionable, see Com. Dig. Action on the case for Defamation, D. 28 and 29; *Bloodsworth v. Gray*, 8 Scott, N. R. 9; 7 M. & G. 334.

(*n*) *Bell v. Stone*, 1 B. & P. 331.

(*o*) *Dibdin v. Swan*, 1 Esp. N. P. C. 28, *Kenyon*, C. J.; and see *Bignell v. Buzzard*, 3 H. & N. 217.

(*p*) *Kelley v. Tinley*, 13 L. J., Q. B. 255.

(*q*) *Soane v. Knight*, M. & Malk. 74.

comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication: and a comment of this description every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury: it is a loss which the party ought to sustain, inasmuch as it is the loss of fame and profits to which he was not fairly entitled (*r*). A writer in a public periodical has no other right than that of any other person of freely discussing the public acts or writings of another, and he is not "privileged" in the proper sense of the word. If, therefore, an article in a newspaper commenting on public acts or writings contain imputations of sordid motives, the *bonâ fide* belief of the writer that the imputations are well founded will afford no defence to an action for libel, unless the acts or writings themselves afford a reasonable ground for such imputation. The belief must not only be honest, but well founded (*s*). So if a person, under the pretence of criticising a literary work, defames the private character of the author, and instead of writing in the spirit, and for the purpose, of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller, and liable to an action (*t*). So where defendant published of a painting, publicly exhibited, that it was a mere daub, with other strong terms of censure; it was held, that it was a question for the jury, whether it was a fair and temperate criticism, or only a vehicle of personal malignity towards the plaintiff (*u*). An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt, is libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious (*v*).

It may now be considered as fully established that faithful and fair reports of the proceedings of courts of justice are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible (*x*), for the general advan-

(*r*) *Carr v. Hood*, 1 Campb. 355, n., *Ellenborough*, C. J.; *M'Leod v. Wakley*, 3 C. & P. 311. *Quære*, whether sermons preached in a church, but not published, are the lawful subject of such public comment. *Gathercole v. Miall*, 15 M. & W. 319.

(*s*) *Campbell v. Spottiswoode*, 3 B. & S. 769; 32 L. J., Q. B. 185.

(*t*) *Nightingale v. Stockdale*, London Sittings after H. T. 49 Geo. III., *Ellenborough*, C. J.; *Fraser v. Berkeley*, 7 C.

& P. 631.

(*u*) *Thompson v. Shackell*, M. & Malk. 187, *Best*, C. J. See *Green v. Chapman*, 4 B. N. C. 92.

(*v*) *Browne v. Croome*, 2 Stark. N. P. C. 297.

(*x*) *Curry v. Walter*, 1 B. & P. 525; but see 1 M. & S. 279, 281; *Smith v. Scott*, 2 C. & K. 580; *Hoare v. Silverlock*, 9 C. B. 20; *Wason v. Walter*, L. R., 3 Q. B.

tage to the country in having such proceedings made public more than counterbalances the injury to individuals (*y*). It must not, however, be taken for granted, that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; that doctrine must be taken with grains of allowance. "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals, on whom they reflect; and if such circumstances were afterwards wantonly published, I should hesitate to say, that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice" (*z*). Hence a highly-coloured account of such proceedings mixed up with insinuations of perjury cannot be justified (*a*); nor can a statement of the circumstances, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence (*b*); for "it does not follow, that because a counsel is privileged as to what he delivers in a court of justice, a publisher may circulate his expressions in a printed paper" (*c*). Nor is it lawful to publish even a correct account of the proceedings of a court of justice, or of a preliminary inquiry before a magistrate, if such account contain matter of a scandalous, blasphemous, or indecent nature (*d*), or if they comprise, or are accompanied by, disparaging observations made by any person other than one whose duty called upon him to make them (*e*). The privilege possessed by reporters of the proceedings in a court of justice extends to the writers of law books citing those reports, provided they use reasonable care and diligence to secure correctness in such citation (*f*). The privilege is not confined to the proceedings of the superior courts; "on such a question the dignity of the court cannot be regarded, and we must look only to the nature of the alleged judicial proceeding which is to be reported. For this purpose, no distinction can be made between a court of *pie poudre* and the House of Lords sitting as a court of justice" (*g*). But if magistrates, "while occupying the bench from which magisterial business is usually administered, under pretence of giving advice, publicly hear slanderous complaints, over which they have no jurisdiction, although their names may be in the commission of the peace; a report of what passes is as little privileged as if they were illiterate mechanics

(*y*) *R. v. Wright*, 1 M. & S. 298, *per Lawrence, J.*; acc. *Lewis v. Levy*, 27 L. J., Q. B. 282; and *Wason v. Waller*, L. R., 3 Q. B.

(*z*) *Stiles v. Nokes*, 7 East, 493, *per Lord Ellenborough*.

(*a*) *Ibid.*

(*b*) *Saunders v. Mills*, 6 Bingh. 213.

(*c*) *Per Parke, J.*, 10 Bingh. 525; 4 M. & Sc. 407.

(*d*) *R. v. Mary Carlile*, 3 B. & A. 167.

(*e*) *Delegal v. Highley*, 3 B. N. C. 950, and 4 B. N. C. 114; *Andrews v. Chapman*, 3 C. & K. 286; *Lewis v. Clement*, 3 B. & A. 702; *Lewis v. Levy*, 27 L. J., Q. B. 282.

(*f*) *Per Cockburn, C. J.*; *Blake v. Stevens*, 11 L. J. (N. S.), 543.

(*g*) *Lewis v. Levy*, judgment of Lord Campbell, C. J.; 27 L. J., Q. B. 282, and see *Duncan v. Thwaites*, 3 B. & C. 556.

assembled in an alehouse" (h). It was formerly considered that *ex parte* proceedings were exempted from the operation of the rule relating to the publication of the proceedings of courts of justice (i). Lord Campbell declined, however, to lay down for law, that the publication of such preliminary inquiries was universally unlawful, although he refused to lay down that such publication was universally lawful (j); but it would seem on general principles that, generally, if fairly and honestly reported, such proceedings are protected (k), unless they contain matter of so indecent or blasphemous a nature as that the publication would be detrimental to the public interests.

The grounds of exemption from legal liability for the publication of the proceedings of courts of justice apply equally to the publication of parliamentary proceedings. Hence a full and faithful report of a parliamentary debate is privileged. "The analogy between the case of the reports of proceedings in courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach to the other. A garbled or partial report, or of detached parts of proceedings published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decision that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *R. v. Lord Abingdon* (l), and *R. v. Creevey* (m); at the same time we are disposed to agree with what was said in *Davison v. Duncan* (n), as to such a speech being privileged if *bonâ fide* published by a member for the information of his constituents" (o). The privilege does not extend to the proceedings of a public meeting, even though called to petition Parliament (p).

In the celebrated case of *Stockdale v. Hansard* (q), it was held, that it was no defence in law to an action for publishing a libel, that the defamatory matter was part of a document, which was, by order of the House of Commons laid before the House, and which was afterwards, by order of the House, printed and published by defendant; and that the House of Commons had heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interest, is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it."

(h) *Ibid.*

(i) *Duncan v. Thwaites*, 3 B. & C. 556.

(j) *Lewis v. Levy*, 27 L. J., Q. B. 282.

(k) *Wason v. Walter*, L. R., 3 Q. B.

(l) 1 Esp. 226.

(m) 1 M. & S. 273.

(n) 2 E. & B. 229.

(o) *Per Cockburn, C. J., Wason v. Walter*.

(p) *Davison v. Duncan*, 7 E. & B. 229; 26 L. J., Q. B. 104; *Hearne v. Stowell*, 12 A. & E. 719.

(q) 9 A. & E. 1.

On demurrer, to a plea suggesting such a defence, a court of law is competent to determine whether or not the House of Commons has such privilege as will support the plea. *S. C.* The consequences resulting from the foregoing decision belong rather to history than to a work of this kind: it is sufficient to state that (as on all similar occasions) the authority of the law prevailed; and, the legislature having interposed, it was, by stat. 3 & 4 Vict. c. 9, enacted, "that all proceedings, criminal or civil, against any person for the publication of any report, paper, votes or proceedings, under the authority of either House of Parliament, shall be stayed, by bringing before the court or judge a certificate, under the hand of the Chancellor, or of the Speaker of the House of Commons, to the effect that such publication is by order of either House of Parliament, together with an affidavit verifying such certificate."

A libel reflecting contemptuously on the proceedings of a court, published while the court is not sitting, may be punished by immediate commitment (*r*).

If a report made by a medical officer of health to a vestry board in pursuance of a local management act contains libellous matter, a newspaper proprietor is not privileged in publishing it, though without any comment (*s*).

A false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular court of justice, will not make the complaint amount to a libel (*t*), even though it be alleged that the defendant acted falsely, maliciously, and without reasonable or probable cause (*u*). So, fairly to comment on a petition, which has been presented to the House of Commons, is not libellous (*x*).

The principles and authorities upon which the doctrine of privileged communication rests (*y*), have been much canvassed in several recent cases, in one of which the following legal canon is adopted: "A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty* (*z*), is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminary matter which, without this privilege, would be slanderous and actionable" (*a*). And this, it would seem, also applies where the communication is made to a person not in fact having

(*r*) *In re Crawford*, 13 Q. B. 613.

(*s*) *Popham v. Pickburn*, 7 H. & N. 891; 31 L. J., Ex. 133.

(*t*) 1 Hawk. B. 1, c. 73, s. 8; *Moulton v. Clapham*, B. R. E. 15 Car. I., Sir W. Jones, 431; March. 20, S. C.; *Doyle v. O'Doherty*, Car. & M. 418.

(*u*) *Revis v. Smith*, 18 C. B. 127.

(*x*) *Dunne v. Anderson*, Ry. & M. 287. See also 3 Bingh. 88.

(*y*) See notes to *Lake v. King*, 1 Wms. Saund. 130, and *post*, tit. *Slander*.

(*z*) It may be either a moral or legal duty. *Per Parke, B.*, in *Toogood v. Spyrring*, 1 C. M. & R. 193.

(*a*) Judgment in *Harrison v. Bush*, 5 E. & B. 348; *Summerville v. Hawkins*, 10 C. B. 583; *Toogood v. Spyrring*, 1 C. M. & R. 181.

such interest or duty, but who might reasonably be, and is supposed to have such interest or duty (b). "Defamatory words are *prima facie* malicious: some occasions rebut the presumption of malice; those are called cases of privileged communication. If the words be more defamatory than the occasion requires, that again raises the presumption of malice" (c). It is for the jury to decide whether the publication is libellous (d), or within such definition of libel as may be stated to them by the judge (e), and the judge ought not, as in *Evans v. Tuson* (f), to direct the jury that it is a libel (g). The judge is to decide whether it is capable of the meaning ascribed by the innuendo, and the jury are to say whether such meaning is truly ascribed (h). But where the defendant insists that the publication is privileged, it is for the judge to rule whether the occasion creates a privilege. If the occasion creates such privilege, but there is evidence of express malice either from extrinsic circumstances, or from the language of the libel itself, the question of express malice should be left to the jury (i). In cases of privileged communication, express malice must be proved by the plaintiff, in order to deprive the defendant of the privilege, and its absence will be presumed until such proof is given (k); but the libel itself may be looked at by the jury in order to determine whether there is express malice (l). On the other hand, if the court hold the occasion not to be privileged, the plaintiff will be entitled to recover even where the jury negative malice (m). And in these cases malice means any corrupt or improper motive (n).

Where C., the mate of a ship, sent to B., a stranger, a letter charging A., the master, with gross misconduct, and B. showed the letter to D., the owner, who dismissed A., the Court of Common Pleas was equally divided as to whether the showing the letter by B. to D. was privileged (o). Where an advertisement was published by the defendant, at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A.; it was held, that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a

(b) *Harrison v. Bush*, 5 E. & B. 344.

(c) *Per Erle, J.*, in *Cooke v. Wildes*, 5 E. & B. 335; and see *Wright v. Woodgate*, 2 C. M. & R. 573.

(d) *Baylis v. Lawrence*, 11 A. & E. 920.

(e) *Parmiter v. Coupland*, 6 M. & W. 105.

(f) 12 A. & E. 733.

(g) *Cooke v. Wildes*, 5 E. & B. 328.

(h) *Blagg v. Sturt*, 10 Q. B. 899.

(i) *Cooke v. Wildes*, 5 E. & B. 328; *Summerville v. Hawkins*, 10 C. B. 583; *Gilpin v. Fowler*, 9 Ex. 615; *Taylor v. Hawkins*, 16 Q. B. 308.

(k) *Summerville v. Hawkins*, 10 C. B. 583; *Harris v. Thompson*, 13 C. B. 333; *Taylor v. Hawkins*, 16 Q. B. 308.

(l) *Cooke v. Wildes*, 5 E. & B. 328; *Gilpin v. Fowler*, 9 Ex. 615; *Wright v. Woodgate*, 2 C. M. & R. 573; and see *Hemmings v. Gasson*, 27 L. J., Q. B. 252.

(m) *Wenman v. Ash*, 13 C. B. 836; *Darby v. Ouseley*, 1 H. & N. 1.

(n) *Turnbull v. Bird*, 2 F. & F. 508, *Erle, C. J.*

(o) *Coxhead v. Richards*, 2 C. B. 569; and see *Blackham v. Pugh*, *ibid.* 611; and *Bennett v. Deacon*, *ibid.* 628.

view, it was not libellous (*p*). A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they entrusted to him, and in which B., the writer of the letter, was likewise interested, was held not to be a libel (*q*). So where the defendant had, *on application* for a character, stated in a written answer, that the plaintiff had, whilst in her service, conducted herself disgracefully, and that she had since been a prostitute; and a similar statement had been made by the defendant to persons who had recommended the plaintiff to her: it was held, that they were privileged communications, and that the plaintiff was properly nonsuited for want of proof of malice (*r*). But where the master wrote a first letter, without a previous application, and then a second in answer to inquiries made of him as to plaintiff's character, Lord *Tenterden*, C. J., left it to the jury to say, whether the communication contained in that letter was made by the master *bond fide*, acting under a belief that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously, with an intention of doing an injury to the plaintiff; and the jury having found that the communication was maliciously made, the court refused to disturb the verdict (*s*). The fact of calling in a third person to hear what is said on dismissing a servant, does not necessarily take away the privilege (*t*). A statement is not privileged on account of its being made in answer to an inquiry by the plaintiff, whether the defendant had made such statement on a former occasion (*u*). In an action for a libel in answer to inquiries respecting the character of a servant, the plaintiff establishes a case to go to the jury, if there is any evidence, as matter of fact, that the answer complained of was untrue to the defendant's knowledge, or as to matters of opinion, that the defendant, in giving the character did not really act on the opinion which he professes to have entertained (*x*). The rule as to privileged communications does not justify defamatory comments on the motives or conduct of the plaintiff (*y*).

There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander (*z*).

(*p*) *Delany v. Jones*, 4 Esp. N. P. C. 191.

(*q*) *M'Dougall v. Claridge*, 1 Campb. 267, Lord *Ellenborough*, C. J.

(*r*) *Child v. Affleck*, 9 B. & C. 403. But see *Tuson v. Evans*, 12 A. & E. 733.

(*s*) *Pattison v. Jones*, 8 B. & C. 578. See *post*, tit. *Slander*.

(*t*) *Toogood v. Spyring*, 1 C. M. & R.

181; *Taylor v. Hawkins*, 16 Q. B. 308.

(*u*) *Griffith v. Lewis*, 7 Q. B. 61.

(*x*) *Fountain v. Boodle*, 3 Q. B. 5. See *Gardner v. Slade*, 13 Q. B. 796, and *Manby v. Witt*, 18 C. B. 544.

(*y*) *Tuson v. Evans*, 12 A. & E. 733.

(*z*) *Per Parke, B., Parmiter v. Coupland*, 6 M. & W. 108. See *Gathercole v. Miall*, 15 M. & W. 319.

A petition addressed by a creditor of an officer in the army to the Secretary-at-War, *bond fide*, and with a view of obtaining through his interference, the payment of a debt due; and containing a statement of facts, which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable (a). So an application to the Home Secretary by a borough elector, imputing misconduct to a justice, and praying that he might be removed from the commission of the peace, is privileged, notwithstanding that the proper officer to have applied to was the Chancellor (b). A letter imputing misconduct to a beneficed clergyman, addressed to the bishop of the diocese by a person who does not live in the district of which the clergyman is incumbent, is privileged if sent *bond fide*, and for the purpose of calling the bishop's attention to the matter (c). A tradesman received a letter in the name of the defendant containing an order for goods. The goods were sent, and returned by the defendant on the ground that he had not ordered them. At his request the tradesman sent him the letter, when he wrote back, stating that in his opinion the letter was written by the plaintiff. It was held, that the statement having been made *bond fide*, was a privileged communication (d). So where the vestry of a parish returned the plaintiff's name to the justices as a fit person to serve as constable, an imputation of perjury made against him before the justices was held to be privileged, although the objections might have been made at the vestry (e).

A defamatory writing, expressing only one or two letters of a name, in such a manner, that, from what goes before and follows after, it must necessarily be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions (f).

A justice of the peace has authority to issue his warrant for the arrest of a party charged with having published a libel; and upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain until he be delivered by due course of law (g).

Persons in partnership, as bankers, may, without showing the proportion of their respective shares, join in an action for a libel

(a) *Fairman v. Ives*, 5 B. & A. 642. See *Woodward v. Lander*, 6 C. & P. 548; *Blake v. Pilford*, 1 Moo. & R. 198.

(b) *Harrison v. Bush*, 5 E. & B. 344; but see *Blagg v. Sturt*, 10 Q. B. 899; and *Robinson v. May*, 2 Smith, 3.

(c) *James v. Boston*, 2 C. & K. 4. See *Gathercole v. Miall*, 15 M. & W. 319; and

Hopwood v. Thorn, 8 C. B. 293.

(d) *Croft v. Stevens*, 7 H. & N. 570; 31 L. J. 143, Ex.

(e) *Kershaw v. Bailey*, 1 Ex. 743.

(f) *Hurt's case*, Trin. 12 Ann., Hawk. Book 1, c. 73, s. 5.

(g) *Butt v. Conant*, 1 B. & B. 548; *Haylock v. Spark*, 1 E. & B. 471.

against them in respect of their business (*h*), in which, however, no damages can be given for injury to their private feelings (*i*), but each may sue severally for the individual damage to himself (*k*).

An alien friend, though resident abroad, is entitled to sue in the courts at Westminster for a libel published in England (*l*).

A court of equity will not interfere by injunction to prevent the publication of a libel (*m*).

II. *Of the Declaration and Pleas.*

Venue.—This is a transitory action, and consequently the venue may be laid in any county. Before the Reg. Gen. H. T., 1853, r. 18, it was held, that in this action the venue could not be changed on the common affidavit, unless the writing and publication were confined to the same county (*n*): in which case the venue might be changed into such county (*o*). If the libel be sent out of England in a letter the venue may be changed into that county in which the letter was written (*p*).

According to the usual form of the declaration in this action, after the prefatory averments which the circumstances of the case may render necessary as inducement to the action, the plaintiff states, "that the defendant falsely and maliciously wrote (or printed) and published (*q*) of the plaintiff (*r*) the words following, that is to say" (*s*): the libel is then set forth *in hæc verba*, accompanied, however, by any innuendoes that may be required to illustrate and explain the tendency and bearing of the libel, and to give it its force and application; and in this part of the declaration care must be taken that the libel be so set forth as to agree with that produced in evidence. Where the libellous meaning is apparent on the face of the libel, innuendoes are unnecessary; but though they be unnecessarily introduced, and be unsupported by

(*h*) *Foster v. Lawson*, 3 Bingh. 452; *Le Fanu v. Malcolmson*, 1 H. L. Cas. 637; and see *Gregory v. Williams*, 1 C. & K. 65.

(*i*) *Haythorn v. Lawson*, 3 C. & P. 196.

(*k*) *Robinson v. Marchant*, 7 Q. B. 918; *Harrison v. Bevington*, 8 C. & P. 708.

(*l*) *Pisani v. Lawson*, 6 B. N. c. 90.

(*n*) *Clark v. Freeman*, 11 Beav. 112; 17 L. J., Chan. 142.

(*o*) *Pinkney v. Collins*, 1 T. R. 571; *Hobart v. Wilkins*, 1 Dowl. 460; *Clementson v. Newcomb*, 3 Dowl. 425.

(*p*) *Freeman v. Norris*, 3 T. R. 306; *Earl of Kerry v. Thorley*, B. R. M. 49 Geo. III., MSS.

(*q*) *Metcalfe v. Markham*, 3 T. R. 652.

(*q*) Although the publication of the libel must be stated in the declaration, yet it will be sufficient to state such matter as amounts to a publication, without using the formal word *published*. *Baldwin v. Elphinston*, 2 Bl. R. 1037. See a comment on this case in *Watts v. Fraser*, 7 A. & E. 233.

(*r*) Judgment was arrested after verdict, because it was not laid that the libel was "of or concerning plaintiff," in *Lowfield v. Bancroft and another*, Str. 934, and in *R. v. Marsden*, 4 M. & S. 164. See also *Clement v. Fisher*, 7 B. & C. 459; and *Hearne v. Stowell*, 12 Q. B. 719.

(*s*) 15 & 16 Vict. c. 76, Sch. B. No. 33.

prefatory averments, they do not vitiate the declaration (*t*). For in actions of libel and slander the plaintiff is "at liberty to aver that the words or matter complained of were used in a defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment is put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration is sufficient" (*u*). This enactment enables the pleader to put any such construction upon the words as he may choose, and to leave it to the jury to say whether such construction is borne out by the evidence (*x*). The words of the libel ought to be stated on the record, in order that the defendant may, if he thinks fit, demur and bring before the court the question whether they amount to a libel. Hence it is not sufficient to declare that the defendant published a libel concerning the plaintiff in his trade, purporting that his beer was of bad quality, and sold by deficient measure; the libel itself ought to be set out, and such declaration is bad on general demurrer (*y*). If the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal (*z*). Where, however, the words of the libel as proved at the trial agreed only in substance with the declaration, the Court of Exchequer held, that amendment introducing the words proved with the words "meaning thereby," immediately before the libel charged, was properly made (*a*). Neither is it sufficient to state that the libel contains in *substance* the matters following (*b*). If the libel be written in a foreign language, the original should first be set forth in the declaration, and then the translation (*c*). If the words be English words, which have acquired some sense different from their natural one, a distinct averment of that fact is necessary, and is properly introduced by way of averment (*d*); and this inducement, when properly pleaded, must be traversed if it is intended to deny it (*e*). But allegorical terms of a defamatory character, or of evil import, such as imputing to a person the qualities of the "frozen snake" in the fable, are libellous *per se*, without any innuendo to explain their meaning (*f*). Where libellous words which, taken *per se*, point at no particular person, yet impute that some one has been guilty of the offence charged, the plaintiff may, by innuendo, apply them to

(*t*) *Harvey v. French*, 1 C. & M. 11;
2 Starkie on Libel, Appendix, cites
Archbishop of Tuam v. Robeson, 5 Bingh.
17.

(*u*) 15 & 16 Vict. c. 76, s. 61.

(*x*) *Hemmings v. Gasson*, 27 L. J.,
Q. B. 255. See *Babonneau v. Farrell*,
15 C. B. 360; *Rawlings v. Norbury*, 1
F. & F. 341.

(*y*) *Wood v. Brown*, 6 Taunt. 169.

(*z*) *Per Tindal*, C. J., *Rutherford v.*
Evans, 6 Bingh. 458.

(*a*) *Saunders v. Bate*, 1 H. & N. 402.
See *Smith v. Knowlesdon*, 2 M. & G. 565;
2 Scott, N. R. 657; 9 Dowl. 402; *Rams-*
dale v. Greenacre, 1 F. & F. 61.

(*b*) *Wright v. Clements*, in arrest of
judgment, 3 B. & A. 503; *Solomon v.*
Lawson, 8 Q. B. 823.

(*c*) *Zenobio v. Actell*, 6 T. R. 162.

(*d*) *Angle v. Alexander*, 7 Bingh. 119.

(*e*) *M'Gregor v. Gregory*, 11 M. & W.
287.

(*f*) *Hoare v. Silverlock*, 12 Q. B. 624.

himself, and it is a question of evidence whether they so apply (*g*). The declaration concludes with the damage, either general, which the law supposes to have been sustained, or special, which the party has actually sustained in consequence of the publication of the libel (*h*).

Of the Pleas.

Before the stat. of 6 & 7 Vict. c. 96, s. 2 (which see *post*, p. 994), money could not have been paid into court in an action for libel. See 15 & 16 Vict. c. 76, s. 70. The defendant may plead the general issue, Not Guilty, which under the rule H. T., 1853, r. 16, operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement (*i*), and no other defence than such denial is admissible under that plea: all other pleas in denial must take issue on some particular matter of fact alleged in the declaration; *e.g.* in an action for slander of the plaintiff in his office, profession or trade, this plea will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. If the supposed libel amounts only to what is termed a privileged communication, this is a defence which may be set up under the plea of not guilty, notwithstanding the foregoing rule (*k*). Special damage is put in issue by not guilty (*l*). Under such plea you may also disprove the fact of publication, or show that it was not of an injurious character (*m*).

If the matter of the libel be true, the defendant may plead it in justification (*n*); but in such justification, if there be anything specific in the subject, issuable facts ought to be stated, and not general charges of misconduct; for where a libel charged an attorney with gross negligence, falsehood, prevarication, and excessive bills of costs in the business which he had conducted for the defendant; it was held that a plea in justification repeating the same general charges, without specifying the particular acts of misconduct, was bad, upon demurrer; and that it was incumbent on the

(*g*) *Merrywether v. Turner*, 7 C. B. 251; 19 L. J., C. P. 10. See *Le Fann v. Malcolmson*, 1 H. L. Cas. 637; *Solomon v. Lawson*, 8 Q. B. 823; *Eastwood v. Holmes*, 1 F. & F. 347.

(*h*) For the mode of declaring on an ironical libel, see *Boydell v. Jones*, 4 M. & W. 446.

(*i*) *M'Gregor v. Gregory*, 11 M. & W. 287; *Fradley v. Fradley*, 8 C. & P. 572; *Gwynne v. Sharpe*, Car. & M. 532; *Heming v. Power*, 10 M. & W. 564; *Wakley v. Healey*, 4 Ex. 53.

(*k*) *Lillie v. Price*, 1 Nev. & P. 16; 5 A. & E. 645; *O'Brien v. Clement*, 15 M. & W. 435; *Hoare v. Silverlock*, 9 C. B. 20; *Lord Lucan v. Smith*, 1 H. & N. 481; 26 L. J., Ex. 94.

(*l*) *Wilby v. Elston*, 8 C. B. 142.

(*m*) *O'Brien v. Clement*, 15 M. & W. 435; 3 D. & L. 576.

(*n*) As to the effect of failing in proof, see *Simpson v. Robinson*, 12 Q. B. 511, *post*, tit. *Slander*. And as to the proof, see *Prior v. Wilson*, 1 C. B., N. S. 95.

defendant, who must be taken to know the particular acts of misconduct, to disclose them (*o*). And if the plea professes to justify the whole libel, but in effect justifies a part only, it will be bad: as where the libel charged the defendant with having stolen cloth and velvet, and the plea justified the accusation only as to taking the velvet, it was held ill (*p*). So where the libel charged that plaintiff, a proctor, had been suspended three times, twice by Sir John Nicholl, and once by Lord Stowell, whereby his neighbours had been led to think he was guilty of extortion; and the plea professing to answer the whole, justified only one of the suspensions, *viz.* one by Sir John Nicholl, and omitted the other two specific charges; it was held bad (*q*). It is sufficient, however, if the charge on the plaintiff's conduct in the libel is substantially met and answered in the justification (*r*). It is unnecessary to repeat every word which might have been the subject of the original comment. So much must be justified as meets the sting of the charge; but if anything be contained in a charge, which does not add to the sting of it that need not be justified (*s*). It is not any bar to the action, that the plaintiff has been in the habit of libelling the defendant; although it may operate in mitigation of the damages (*t*). It is not sufficient to plead that the defendant received the libellous statement from another, and that, upon publication, he disclosed the author's name, and believed all the statements to be true (*u*). Where the libel tended to make a man ridiculous, it was held to be no defence, that he himself told the same story to a party of friends (*x*).

It is a good plea that after the commencement of the action the plaintiff and defendant agreed to accept the publication of mutual apologies in satisfaction and discharge of the causes of action, damages, and costs, and that such apologies were published (*y*).

Where the defendant pleaded a justification only, without the general issue, he was formerly entitled to begin (*z*). But a "resolution has been come to by all the judges, that in cases of slander, libel, and other actions for personal injuries where the plaintiff seeks to recover actual damages, of an unascertained amount, he

(*o*) *Holmes, Gent. one, &c. v. Catesby*, 1 Taunt. 543; recognized in *Hickinbotham v. Leach*, 10 M. & W. 361.

(*p*) *Johns v. Gittings*, Cro. Eliz. 239.

(*q*) *Clarkson v. Lawson*, 6 Bingh. 266; recognized in *M'Gregor v. Gregory*, 11 M. & W. 287.

(*r*) *Edwards v. Bell*, 1 Bingh. 403; *Clarke v. Tuzlor*, 2 B. N. C. 668; *Smith v. Parker*, 13 M. & W. 459; 2 D. & L. 394; *O'Brien v. Bryant*, 16 M. & W. 168; 4 D. & L. 341; *Hickinbotham v.*

Leach, 10 M. & W. 361; 2 D. N. S. 270; *Helsham v. Blackwood*, 11 C. B. 111; *Tighe v. Cooper*, 7 E. & B. 639; 26 L. J., Q. B. 315.

(*s*) *Ibid.*

(*t*) *Finnerty v. Tipper*, 2 Campb. 76.

(*u*) *Tidman v. Ainslie*, 10 Ex. 63; *De Crespigny v. Wellesley*, 5 Bingh. 392.

(*x*) *Cook v. Ward*, 6 Bingh. 409.

(*y*) *Boosey v. Wood*, 3 H. & C. 484.

(*z*) *Cooper v. Wakley*, Moo. & M. 248 3 C. & P. 474.

is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant" (a).

Where the allegations in a libel are divisible, one part may be justified separately from the rest, if a proper justification can be made out (b). But where the declaration stated that the defendant published a libel with intent to cause it to be believed, that the plaintiff had been guilty of feloniously stealing a horse; and the justification only stated, that the plaintiff was on certain grounds suspected of stealing it; it was held, on demurrer, to be insufficient (c).

To this action the defendant may plead the Statute of Limitations, that is, "that the cause of action did not accrue at any time within six years next before the commencement of the plaintiff's action;" but such a plea, in an action for a libel in a newspaper, will be negatived by proof of the purchase of a single copy from the defendant by an agent of the plaintiff within the six years (d).

By 6 & 7 Vict. c. 96, s. 2, in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead, that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper, or other periodical publication, a full apology for the said libel; or, if the newspaper, or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, he offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea, be at liberty to pay into court a sum of money, by way of amends, for the injury sustained by the publication of such libel; and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, under an act passed in the session of Parliament, held in the fourth year of his late majesty, intituled "An Act for the further Amendment of the Law, and the better Advancement of Justice." And that to such plea to such action, it shall be com-

(a) *Per Tindal, C. J.*, in *Carter v. Jones*, 6 C. & P. 64; 1 Moo. & R. 281. See 5 Q. B. 462; 3 Ex. 699; 2 C. & K. 748.

(b) *Clarkson v. Lawson*, 6 Bingh. 587; *Clarke v. Taylor*, 2 B. N. C. 664; *Eaton*

v. Johns, 1 D. N. S. 602. See opinion of *Tenterden, C. J.*, in following case.

(c) *Mounthey v. Watton*, 2 B. & Ad. 673.

(d) *Duke of Brunswick v. Harmer*, 14 Q. B. 185.

petent to the plaintiff to reply generally, denying the whole of such plea. Under this section the plaintiff is at liberty to deny the whole or any part of such a plea; and a replication which admits the insertion of the libel in a newspaper, and the payment into court, but traverses the insertion of the libel without actual malice, and without gross negligence, and the sufficiency of the money paid into court is good (e). The apology must not only be in its terms sufficient, but must appear at least as prominently in the newspaper as the libel (f). Where a defendant pleaded an apology and payment into court of 5*l.* by way of amends, and the jury found that the apology was not sufficient, the learned judge directed the jury to assess the damages without regard to the amount paid into court, as the defendant did not thereby admit that the plaintiff had sustained damages to that amount (g).

The sixth section provides, that nothing in this act contained shall take away or prejudice any defence under the plea of Not Guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel. A special plea of apology and payment into court under the statute will not, however, be allowed together with the general issue to the same part of the declaration (h).

III. *Of the Evidence.*

By 6 & 7 Vict. c. 96, s. 1, in any action for defamation, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

The libel must be produced, and before it is read, it must be proved that it was *published* by the defendant. The mode of publication may be proved in order to enhance the damages. The mere parting with a libel with such an intent, whereby a defendant loses all power of future control over it, is an uttering, which seems to be the meaning of the word *publishing*, without an actual communication of the contents of the paper (i). If it be proved, that the libel was bought in the shop of a bookseller, of a person

(e) *Chadwick v. Herapath*, 3 C. B. 37 L. J., Ex. 1.
 885. (h) *O'Brien v. Clement*, 15 M. & W. 435.
 (f) *Lafone v. Smith*, 28 L. J., Ex. 33.
 (g) *Jones v. Mackie*, L. R. 3, Ex. 1; (i) *R. v. Burdett*, 4 B. & A. 135.

acting in the shop as the servant of the bookseller, this will be *prima facie* evidence of a publication by the bookseller, inasmuch as he has the profits of the shop, and is therefore answerable for the consequences (*k*). Where a publication is defamatory, the law infers malice, unless anything can be drawn from the circumstances attending the publication to rebut that inference (*l*). If the libel be in a foreign language, in which case, as it has already been observed, the libel must be set forth in the declaration, both in the original language, and in the English translation, further proof will be necessary. In the case of *R. v. Peltier*, which was an information against defendant for a libel on Napoleon Bonaparte, the evidence on the part of the prosecution was as follows:—A witness proved that he had purchased several copies of the book, containing the libel in question, of a certain bookseller, which copies he had marked at the time. 2. The bookseller proved that defendant was the publisher of the book, and employed him to dispose of the copies on his account, and that he had accounted for them. 3. *An interpreter was then called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original, and then the translation was read by the clerk at Nisi Prius.*

Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references; it was held, that these omissions altered the sense of the remainder, and the variance was fatal (*m*).

In an action for a libel, after the libel, on which the action was brought, had been read, the plaintiff's counsel offered in evidence other libels written by the defendant. This having been objected to, on the ground that the plaintiff could not give in evidence anything which would of itself constitute a ground for a distinct action; Lord *Kenyon*, C. J., said, he thought that the evidence was admissible, and compared it to actions for slander, in which evidence of other words besides those stated in the declaration was usually received to show the malice of the defendant (*n*). So in *Rustel v. Macquister* (*o*), the plaintiff, having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards; this being objected to on the ground that these latter words might become the subject of a future action, Lord *Ellenborough* overruled the objection, observing, that evidence might be given of any words as well as any act of

(*k*) *R. v. Almon*, 5 Burr. 2686.

(*l*) *Darby v. Ouseley*, 1 H. & N. 1; *per Le Blanc, J.*, in *R. v. Creevey*, 1 M. & S. 273, 282.

(*m*) *Cartwright v. Wright*, 5 B. & A.

615.

(*n*) *Lee v. Huson*, Peake, 166; *Charler v. Barrett*, Peake, 22, and *post*, tit. Slander.

(*o*) 1 Campb. 49, n.

the defendant's to show *quo animo* he spoke the words which were the subject of the action. Still, however, it would be the duty of the judge to tell the jury, that they must give damages for those words only which were the subject of the action. So *per* Sir J. Mansfield, in *Finnerty v. Tipper* (c), "In actions for words, it has been allowed to give evidence of words subsequently spoken, for the purpose of showing that the original words were spoken maliciously and to injure." In an action on the case for publishing a libel against the defendant in a paper entitled the "Weekly Political Register" (d), a witness was called who proved that he had purchased one of the papers, containing the libel in question *before* the action was brought; he was then proceeding to prove that he had purchased another copy of the same paper *after* the action was brought. This was objected to, on the part of the defendant, on the ground that the publication of the last-mentioned copy might become the subject of a future action, and, therefore, that it ought not to be given in evidence to increase the damages in this action. But Lord Ellenborough, C. J., was of opinion, that although it was not admissible for the purpose of aggravating the damages, yet it was evidence to show that the paper was circulated deliberately. In *Barwell v. Adkins* (e), which was an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence on the trial a second paragraph, subsequently published in the same paper, in which the libellous charge was repeated, for the purpose of showing the intention of the defendant, and the jury were told to take the two paragraphs with them, and to give such damages as they considered the plaintiff entitled to; and a new trial, on the ground of misdirection, was refused. But in *Finnerty v. Tipper* (f), Sir J. Mansfield ruled, that the plaintiff could not give in evidence other subsequent libels published concerning him by the defendant, unless they directly referred to the libel set forth in the declaration. And in *Stuart v. Lovell*, 2 Stark. 93, Lord Ellenborough, C. J., held, that the plaintiff could not give in evidence subsequent publications by the defendant, where the intention of the publication in question was not equivocal. The Court of Common Pleas, however, have decided that where the plaintiff, in order to show *quo animo* the libel was written, gave in evidence two subsequent letters addressed by the defendant to third parties, containing substantially a repetition of the slander; such letters were properly received, though the libel declared on was free from ambiguity, and the letters were written after the commencement of the action; and that their admissibility was not affected by the lapse of time

(c) 2 Campb. 76. But see *Mead v. Daubigny*, Peake, 125; and see *Hemmings v. Gasson*, 27 L. J., Q. B. 252.

(d) *Plunkett v. Cobbett*, before Lord Ellenborough, Middlesex Sittings, 26th May, 1804, MSS.

(e) 1 M. & Gr. 807; 2 Scott's N. R. 11.

(f) 2 Campb. 72, confirmed in *Wakley v. Johnson*, Ry. & M. 422. See also *May v. Brown*, 3 B. & C. 113; and *Tarpley v. Blabey*, 2 B. N. C. 437.

intervening between the writing of the respective letters (*g*). Evidence that copies of the newspaper containing the libel have been gratuitously circulated in the plaintiff's neighbourhood, though not shown to have been sent by the defendant, the publisher, is admissible to show the extent of the circulation of the paper, and consequent injury to the plaintiff (*h*). The jury ought properly to be cautioned not to give damages in respect of the subsequent libels (*i*), but the omission to give such caution does not seem to amount to a misdirection (*j*).

Under the plea of Not Guilty, the plaintiff cannot adduce evidence to show that the allegations in the libel are false (*k*). But in an action for a libel, purporting to be a report of a coroner's inquest, evidence of the correctness of the report is admissible under the general issue in mitigation of damages; but evidence of the truth or falsehood of the facts stated at the inquest is not admissible on either side (*l*). It is for the judge at Nisi Prius to decide all preliminary questions of fact upon which the admissibility of the evidence depends in actions for libel, as well as in other cases (*m*).

Previously to the statute 6 & 7 Vict. c. 96 (*n*), where a libel contained matters imputing to another a crime capable of being tried, evidence could not be received at the trial of an indictment for libel of the truth of those imputations; but now, by s. 6 of that statute, under certain conditions, the truth may be pleaded. Where, therefore, the libel contained imputations that certain persons at M. had been guilty of murder; the court held, that the judge, at the trial, properly refused evidence of the truth of the transactions stated in the libel to have taken place at M. (*o*). Under a plea of justification in an action, evidence of the truth appears to be admissible notwithstanding a previous verdict of acquittal (*p*).

General evidence, that the plaintiff has been in the habit of libelling the defendant, is inadmissible (*q*). The defendant cannot be allowed (*r*) to do more than prove the publication, by the plaintiff, of libels which are connected with the libel which is the subject of

(*g*) *Pearson v. Lemaitre*, 6 Scott, N. R. 607; 5 M. & G. 700. See *Barwell v. Atkins*, 1 M. & G. 807; *Camfield v. Bird*, 3 C. & K. 56; *Barrett v. Long*, 3 H. L. Cas. 395; *Chubb v. Westley*, 6 C. & P. 436.

(*h*) *Gathercole v. Miall*, 15 M. & W. 319.

(*i*) *Pearson v. Lemaitre*, 6 Scott, N. R. 607.

(*j*) *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227.

(*k*) *Stuart v. Lovell*, 2 Stark. 93; and see *Brine v. Bazalgette*, 3 Ex. 692.

(*l*) *East v. Chapman*, M. & Malk. 46,

Tenterden, C. J. See *Nanton v. Rowe*, 1 C. & K. 616.

(*m*) *Boyle v. Wiseman*, 11 Ex. 360; 24 L. J., Exch. 384.

(*n*) See *post*, p. 1003.

(*o*) *R. v. Burdett*, 4 B. & A. 145.

(*p*) *England v. Bourke*, 3 Esp. 80; *Cook v. Field*, 3 Esp. 133; *Helsham v. Blackwood*, 11. C. B. 111. See *Wakley v. Cooke*, 4 Ex. 511.

(*q*) *Wakley v. Johnson*, Ry. & Moo. 422, *Best*, C. J.

(*r*) 2 Stark. on Libel, p. 100, cites *May v. Brown*, 3 B. & C. 113.

the action; and clearly applicable to the defendant's libel (s). Where the object of the evidence is to show that the defendant was provoked by libels published against him, it is essential that some proof should be given of the libels having come to the defendant's knowledge (t).

In an action for defamation either party may, as has been already observed, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive (u); but where the defendant contends that the libel is true, he must justify on the record. In one case, where the facts to be proved on the part of the defendant did not constitute a complete justification, as where they showed a ground of suspicion not amounting to actual proof of the plaintiff's guilt; it was held, by *Eyre, C. J.*, that such facts might be given in evidence, on the general issue, in mitigation of damages (x). This doctrine, however, to the extent here laid down, seems questionable. In *Sir John Eamer v. Merle*, before Lord *Ellenborough*, which was an action for words of insolvency, the defendant was permitted to prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured. And in a case before *Le Blanc, J.*, at Worcester, that learned judge received evidence under the general issue, that the plaintiff had been guilty of attempts to commit the crime which the defendant had imputed to him (y). So in the case of the *Earl of Leicester v. Walter* (z), the defendant was permitted to prove, under the general issue, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion his relations and acquaintances had ceased to associate with him. And in *Wyatt v. Gore* (a), *Gibbs, C. J.*, permitted the defendant, under the general issue, to prove that the substance of the libel charged in the declaration had been previously published in a newspaper; and held, that it was not necessary to lay a basis for this evidence by producing the newspaper. In — v. *Moor*, in an action of slander, imputing a specific charge of unnatural practices to plaintiff, where the declaration contained the then usual allegation of good fame, &c., it was held, that the witness who proved the words might be asked, upon cross-examination, whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages (b). In a similar case the Court of Queen's Bench held, that the defendant could not ask a witness whether he had heard that the plaintiff was addicted to such prac-

(s) *Tarpley v. Blabey*, 2 B. N. C. 437. See *Watts v. Fraser*, 1 M. & Rob. 449.

(t) By the court, *Watts v. Fraser*, 7 A. & E. 232.

(u) *Pearson v. Lemaitre*, 5 M. & Gr. 700; 6 Scott, N. R. 607; ante, p. 997.

(x) *Knobel v. Fuller*, Peake's Ev. 287,

ed. 2; Peake's Add. Cases, 139. See *Rumwey v. Webb*, Car. & M. 104.

(y) 2 Campb. 253, 254.

(z) *Ibid.* 251.

(a) Holt, 299.

(b) 1 M. & S. 284; *Richards v. Richards*, 2 Moo. & R. 557.

tices, the question being general, and not confined to reports existing at the time of the slander; but the court declined to decide the general question (*c*). But although general reports have been admitted in mitigation of damages, under the general issue, specific facts are not so admissible (*d*). In *Saunders v. Mills* (*e*), the defendant (the editor of a newspaper) was permitted, under the general issue, in mitigation of damages, to show that he copied the libellous paragraph from another newspaper, but was not allowed to show that it had appeared concurrently in several other newspapers.

It is not competent to a defendant charged with having published a libel, to prove that a paper similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it (*f*). There having been in a libellous letter a reference to a newspaper, as the authority upon which the libel was founded; it was held, that the newspaper referred to might be given in evidence on the general issue, in mitigation of damages (*g*). But Lord *Denman* would not allow the defendant, in mitigation of damages, to show that the libel was communicated by a correspondent (*h*). Defendant may have the whole of the publication read from which the passages charged are extracts (*i*); so the defendant has a right to have read, *as part of the plaintiff's case*, another part of the same newspaper referred to in the libel complained of (*k*).

Proof that the libel was contained in a letter (*l*) directed to the plaintiff, and delivered into the plaintiff's hands, is not sufficient proof of publication to maintain *an action*. The same point was admitted in *Hicks's case*, in the Star Chamber, Hob. 215. But an indictment or information may be sustained in this case, because such letter, being a provocation to a challenge and breach of peace, is considered as a misdemeanor. *Per Chambre, J.*, in *R. v. Hornbrook*, Devon Summer Assizes, 1812, who there said, "It is not necessary to constitute a publication in a criminal prosecution, to show that it has been published to the world. It is sufficient if it is sent to the party libelled, its criminality depending upon its tendency to provoke the party libelled to a breach of the peace. Sending

(*c*) *Thompson v. Nye*, 16 Q. B. 175.

(*d*) *Mills v. Spencer*, Holt, 535, *Gibbs*, C. J. See also *Waithman v. Weaver*, 1 D. & R. 10; 11 Price, 257, n.; 2 Starkie on Slander, 90 (2nd edit.).

(*e*) 6 Bingh. 213. See *East v. Chapman*, M. & Malk. 46; *May v. Brown*, 3 B. & C. 113; *Watts v. Fraser*, 7 C. & P. 369.

(*f*) *R. v. Holt*, 5 T. R. 436; *R. v. Newman*, 1 E. & B. 268.

(*g*) *Mullett v. Hulton*, 4 Esp. N. P. C. 248, *Ellenborough*, C. J.; *Saunders v. Mills*, 6 Bing. 213, cited by *Tindal*, C.

J., in *Pearson v. Le Maitre*, 5 M. & G. 719.

(*h*) *Talbot v. Clark*, 2 Moo. & R. 312. This case would seem to be overruled by *Pearson v. Lemaitre*, 5 M. & G. 719.

(*i*) *Cooke v. Hughes*, Ry. & Moo. 112. See *Darby v. Ouseley*, 1 H. & N. 1.

(*k*) *Thornton v. Stephen*, 2 Moo. & Rob. 45, *Denman*, C. J., on reference to *R. v. Lambert*, 2 Campb. 398.

(*l*) *Phillips v. Jansen*, 2 Esp. N. P. C. 625, *per Kenyon*, C. J., *S. P.*, admitted by *Chambre, J.*, in *R. v. Hornbrook*, Devon Summ. Ass. 1812, MS.

a letter to the plaintiff's wife, containing a libel on her husband, is a publication (*m*). The writing and publication must be proved (*n*). Proof that the defendant accounted for the stamp duties of the newspaper in which the libel was contained, has been held to be proof of publication (*o*). In an action for a libel, contained in a letter written by the defendant's daughter, who usually wrote his letters of business, when there was not any evidence given to show that she was authorized or instructed by him to write the letter in question, or that he had recognized it; it was held, that there was not any evidence to go to a jury against the defendant, inasmuch as it was not an act within the scope of the daughter's authority (*p*).

The proceedings against the printers, publishers, and proprietors of newspapers, either civilly or criminally (*q*), for any libel contained in such paper, are much facilitated by 6 & 7 Will. IV. c. 76, by which it is enacted (*r*), that no person shall print or publish any newspaper before there shall be delivered at the Stamp Office, or to proper officers a declaration in writing, containing, 1. The correct title of the newspaper. 2. A true description of the houses or buildings wherein such newspaper is intended to be printed and published. 3. The true name, addition and place of abode of the printer and publisher, and of every person resident out of the United Kingdom who shall be proprietor thereof; and also, of every proprietor resident in the United Kingdom, if not exceeding two, exclusive of printer and publisher; if they do, then of such two proprietors, the amount of whose respective proportional shares in the property shall not be less than the proportional share of any other proprietor resident in the United Kingdom, exclusive of printer and publisher, specifying the amount of their shares. This declaration is to be signed by printer, publisher, and the named proprietors resident in the United Kingdom. The act then directs when fresh declarations shall be made, and before whom the declarations are to be made, and imposes a penalty if the declaration be false or defective. By sect. 8, such declarations are to be filed, and certified copies thereof shall be admitted in all proceedings civil and criminal, and upon every occasion, touching any newspaper mentioned in such declaration, or touching any publication, matter, or thing contained in such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration, as are required by the act to be therein set forth, &c.; and after production

(*m*) *Wenman v. Ash*, 13 C. B. 836; 22 L. J., C. P. 190.

(*n*) 1 Moore (C. P.) 477. See *Brookes v. Tichborne*, 5 Ex. 929.

(*o*) *Cook v. Ward*, 6 Bingh. 409. As to what is sufficient evidence against a person not connected with the newspaper of having caused a libel to be published in it, see *R. v. Cooper*, 8 Q. B. 533.

(*p*) *Harding v. Greening*, 1 Moore (C.

P.) 477; 8 Taunt. 42.

(*q*) The proprietor of a newspaper is answerable criminally, as well as civilly, for the acts of his servants, in the publication of a libel, although it can be shown that such publication was without the privity of the proprietor. *R. v. Walter*, 3 Esp. 21.

(*r*) Sect. 6.

of the declaration, and of a newspaper corresponding in every respect with the description of it in the declaration, it will not be necessary to prove the purchase of the newspaper (s). A mortgagee, by registering himself as one of two proprietors of a newspaper, renders himself liable to actions as such, even though he also describes himself as mortgagee (t). It is not necessary, in order to take advantage of the eighth section, that the imprint of the paper produced should correspond verbatim with the certified copy (u).

Where the justification avers the truth of several facts which form the ingredients of the libel, each and every of the facts so alleged to be true must be distinctly proved; in order to entitle the defendant to a verdict on the justification (x), the issue being indivisible (y).

An executor may, under the 17 Car. II. c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for a libel (z).

Where seven actions were brought against the same defendant for different publications of the same libel, proceedings in all but one were stayed until the one had been tried (a).

In an action for libel, the judge may certify, under the 3 & 4 Vict. c. 24, s. 2, that the grievance for which the action was brought was wilful and malicious (b).

Doubts having arisen, whether, on the trial of an indictment or information for a libel, upon the plea of Not Guilty, it was competent to the jury to give their verdict upon the whole matter in issue; it was, by "Mr. Fox's Libel Act," 32 Geo. III. c. 60, enacted and declared, that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required or directed by the court to find the defendant guilty, merely on the proof of the publication, and of the sense ascribed to the same in the indictment or information: provided, that the court shall give their opinion and direction to the jury on the matter in issue, as in other criminal cases (c): and provided also, that the jury may, in their discretion, find a special verdict (d), and also that the defendants, if found guilty, may move in arrest

(s) See *R. v. Woolmer*, 4 P. & D. 137; 12 A. & E. 422; *Holcroft v. Higgins*, 2 C. B. 488.

(t) *Duke of Brunswick v. Harmer*, 3 C. & K. 10.

(u) *Baker v. Wilkinson*, Car. & M. 399.

(x) *Weaver v. Lloyd*, 2 B. & C. 678. See 15 & 16 Vict. c. 76, s. 139.

(y) *Biddulph v. Chamberlain*, 17 Q. B. 351.

(z) *Palmer v. Cohen*, 2 B. & Ad. 966.

As to the proof of an issue of *mal tuel* record on a plea of judgment recovered, see *Wandsworth v. Bentley*, 23 L. J., Q. B. 3; 1 B. C. C. 203; and *The Duke of Brunswick v. Pepper*, 2 C. & K. 683.

(a) *Jones v. Pritchard*, 6 D. & L. 529.

(b) *Foster v. Pointer*, 8 M. & W. 395; see *Sherwin v. Swindall*, 12 M. & W. 783.

(c) Sect. 2.

(d) Sect. 3.

of judgment as before the passing this act (e). The foregoing statute does not affect civil cases, but is confined to criminal (f).

It has been the course for a long time for the judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action. The judge is not bound to state to the jury, as a matter of law, whether the publication complained of, be a libel or not. Mr. Fox's Libel Bill was a declaratory act, and put prosecutions for libel on the same footing as other criminal cases (g).

On the subject of indictments for the publication of defamatory libels, stat. 6 & 7 Vict. c. 96, ss. 4, 5, 6. By section 6 the defendant is empowered, in addition to the plea of not guilty, to plead the truth of the libel, together with an allegation that it was for the public benefit that the matters charged should be published and specific facts to show how it was so. And, on conviction, the court in pronouncing sentence may take the plea and evidence offered in support of it into consideration, in aggravation or mitigation as the case may be. Where the libel contains several distinct imputations, and the plea alleges the truth of all and is traversed generally, if the evidence fail as to any one of them the verdict will be entered generally against the defendant (h).

In an action for a libel, charging the plaintiff with insolvency, the defendant is not entitled to an order, under 14 & 15 Vict. c. 99, s. 6, to inspect the books and accounts of the plaintiff for the purpose of establishing a justification (i).

The reader, who is desirous of investigating the law of libel and slander as applied in Scotland, is referred to a very learned and ingenious work published at Edinburgh by John Borthwick, Esq., advocate. It is worthy of consideration, whether a portion of that law might not be introduced with effect into our system.

(e) Sect. 4.

(f) *Levi v. Milne*, 4 Bingh. 195.

(g) *Per Parke, B., Parmiter v. Coupland*, 6 M. & W. 108, recognized in *Baylis v. Lawrence*, 3 P. & D. 526; 11 A. & E. 920. See *Blagg v. Sturt*, 10 Q. B. 899; and *ante*, p. 987.

(h) *R. v. Newman*, 1 E. & B. 558; and

see *S. C. ibid.* 268. As to proceedings to enforce recognizances under 60 Geo. III. c. 9, and 1 Will. IV. c. 73, see *Ex parte The Duke of Brunswick*, 3 Ex. 829, and 6 Ex. 22; 21 L. J., Ex. 113.

(i) *The Metropolitan Saloon Omnibus Company v. Hawkins*, 32 L. T. 281; 4 H. & N. 146.

CHAPTER XXVII.

MALICIOUS PROSECUTION.

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I. *Of the Action on the Case for a Malicious Prosecution, and in what Cases such Action may be maintained.*

AN action on the case lies against any person who maliciously, and without probable cause, prosecutes another, whereby the party prosecuted sustains an injury, either in person, property, or reputation. The action on the case for a malicious prosecution bears a strong analogy to the old and now obsolete action for a conspiracy; hence, it is frequently termed an action on the case in the nature of a conspiracy (*a*). But the grounds of the old action for conspiracy are narrow and confined, when compared with those on which the action on the case for a malicious prosecution is founded. The action for a conspiracy, having been framed according to the precise terms of a writ in the register, whose limits it does not presume to transgress, lies only in cases where two or more persons maliciously conspire to indict any person falsely of treason or felony (*b*), who is afterwards *lawfully* acquitted. The action on the case for a malicious prosecution varies its form as the circumstances of each particular grievance may require. Whatever engines of the law malice may employ to compass its evil designs against innocent and unoffending persons, whether in the shape of indictment or information (*c*), which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice is evinced by malicious arrests, or by exhibiting groundless accusations, merely with a view to occasion expense (*d*) to the

(*a*) *Marsh v. Vaughan and another*, Cro. Eliz. 701; *Mills v. Mills*, Cro. Car. 239.

(*b*) See the opinions of *Holt*, C. J., and *Treby*, C. J., that a conspiracy lies only for procuring another to be indicted for

treason or felony, where life was in danger. *Ld. Raym.* 379.

(*c*) *Moore v. Shutter*, 2 Show. 295.

(*d*) *Jones v. Gwynn*, Gilb. R. 185; 10 Mod. 148, 214.

party, who is under the necessity of defending himself against them, this action on the case affords an adequate remedy to the party injured. It may be brought against one only (*e*); and where it is brought against two or more defendants, although a conspiracy be alleged in the declaration, and a verdict be found for all the defendants except one, yet the plaintiff will be entitled to judgment (*f*). On the contrary, the action for a conspiracy must be brought against two persons at the least (*g*), because the gist of the action is the conspiracy; and if one only be found guilty (*h*), or if all except one are discharged by matter of law (*i*), the action fails. And to maintain an action for a conspiracy, the party indicted must have been acquitted upon a good indictment (*k*), by verdict, for such is the language of the writ, "*legitimo modo acquietatus*," or "lawfully acquitted;" which imports such an acquittal of the crime charge as will entitle the party to plead *auter foits acquit*, in case he be afterwards prosecuted for the same crime (*l*).

But in an action on the case for a malicious prosecution, it is not necessary that the plaintiff should allege or prove such an acquittal: for it may be brought under circumstances which preclude the possibility of such an acquittal: as, 1st, where a bill of indictment has been preferred, and returned *ignoramus* (*m*). 2ndly, where the indictment has been preferred *coram non iudice* (*n*). And lastly, where a party has been acquitted on a defect in the indictment (*o*). Formerly, indeed, it was supposed, that an acquittal on the ground of the insufficiency of the indictment, was a material objection, where the subject-matter of the indictment did not affect the reputation of the party accused, and he had not been imprisoned; because scandal and imprisonment were at that time considered as the only kinds of damage for which this action would lie. But it having been decided in the case of *Savile v. Roberts* (*p*), that the expense incurred by a groundless prosecution, without scandal or imprisonment of the party accused, was sufficient to support this action where the indictment was good, *quoad* the damage; it was shortly afterwards held, in a case (*q*) where the subject-matter of the indictment did not affect the reputation of the plaintiff, and where the only damage which the plaintiff had sustained was the expense attending the prosecution, that this action might be maintained, although the plaintiff had been prosecuted on an insufficient indictment. The decision of *Savile v. Roberts* has been confirmed by the case of *Smith v. Hixon*, Str. 977, more fully reported in Ca.

(*e*) *Mills v. Mills*, Cro. Car. 239.

(*f*) *Price v. Crofts*, Sir. T. Raym. 180; *Pollard v. Evans and others*, 2 Show. 50. See also *Subley v. Mott*, 1 Wils. 210.

(*g*) F. N. B. 260, 4to edit. 1755.

(*h*) 28 Ass. 12, cited in F. N. B. 260.

(*i*) *Ibid.* in nota.

(*k*) Bro. Conspiracie, pl. 23.

(*l*) Gilb. 199.

(*m*) *Payn v. Porter*, Cro. Jac. 490; Agr. 2 Roll. R. 188.

(*n*) 1 Roll. Abr. 112, pl. 9.

(*o*) *Jones v. Gwynn*, Gilb. 185; *Wicks v. Fentham*, 4 T. R. 247.

(*p*) Salk. 13; Carth. 416; Ld. Raym. 374.

(*q*) *Jones v. Gwynn*, Gilb. 185; 10 Mod. 148, 214.

Temp. Hardw. 54, where it was adjudged that a husband alone, might maintain an action for the malicious prosecution of his wife, the *expenses* of which had been defrayed by the husband. The case of *Jones v. Gwynn* was recognised in *Chambers v. Robinson*, Str. 691, and in *Wicks v. Fentham*, 4 T. R. 247; where it was held, that this action would lie, although plaintiff had been acquitted on a defect in the indictment, the subject-matter of which did not affect his reputation. See also *Pippett v. Hearn*, 5 B. & A. 634; where it was held, that an action would lie for the malicious prosecution of a bad indictment for perjury.

The grounds of the action for a malicious prosecution are, the malice of the defendant, either expressed or implied (*r*); want of probable cause (*s*); and an injury sustained by the plaintiff, by reason of the malicious prosecution, either in his person by imprisonment, his reputation by the scandal, or in his property by the expense. If the plaintiff cannot prove any such injury, he cannot maintain the action (*t*). It lies on the plaintiff to give *prima facie* evidence (*u*) of want of probable cause; but slight evidence (*v*) is sufficient to throw the onus on the defendant of showing that there was probable cause.

In *Incedon v. Berry*, Devonshire Summer Ass. 1805, 1 Campb. 203, n. (a), recognized by Dallas, C. J., in *Turner v. Turner*, Gow's N. P. C. 20, in an action for maliciously indicting plaintiff for perjury, Lens, Serjt., for the plaintiff, having proved express malice, contended, that it was not necessary for him to proceed any further, and that it lay on the defendant to show probable cause for having instituted the prosecution; but *Le Blanc*, J., ruled, that some evidence (though slight evidence would be sufficient) must be given *on the part of the plaintiff* of want of probable cause, before the defendant could be called upon for his defence. In *Wallis v. Alpine*, 1 Campb. 204, n., Lord *Ellenborough*, C. J., held, that plaintiff was not excused from giving evidence of want of probable cause, from the circumstance of defendant, who had commenced a prosecution, having neglected to prefer a bill of indictment (*x*).

"The *essential* ground of this action is, that a legal prosecution was carried on *without probable cause*. We say this emphatically, because every other allegation may be implied from this; but this must be substantively proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed

(*r*) *Purcell v. Macnamara*, 9 East, 361; *Hadrick v. Heslop*, 12 Q. B. 267.

(*s*) *Farmer v. Darling*, 4 Burr. 1971.

(*t*) *Byne v. Moore*, 5 Taunt. 187.

(*u*) *Willans v. Taylor*, 6 Bingh. 183;

affirmed (*on error*), B. R., 2 B. & Ad. 845.

(*v*) *Cotton v. James*, 1 B. & Ad. 128.

(*x*) See also on this point *Turner v. Ambler*, 10 Q. B. 252.

from apparent guilt: and in neither case is he liable to this kind of action" (y).—"The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause is a question of law" (z).—"The question of probable cause, arising upon the facts proved or admitted, is a question for the court, and in general the plaintiff must give some evidence showing the absence of probable cause. But such evidence is, in effect, the evidence of a negative; and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative, especially where the nature of the affirmation is such as to admit of proof by witnesses, and cannot depend upon matters lying exclusively within the party's own knowledge, as in some cases of criminal prosecution it may do" (a).—"It is difficult to lay down any general rule as to the cases where the opinion of a jury should or should not be taken. I have considered the correct rule to be this: if there be any fact in dispute between the parties, the judge should leave that to the jury, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant" (b). It is a question for the jury, whether the facts brought forward in evidence be true or not, but what is reasonable or probable cause is matter of law (c). In an action brought for maliciously prosecuting the plaintiff for perjury, the judge asked the jury whether the defendant believed, or had reasonable and probable cause for believing, that the plaintiff's evidence was false, and whether there was malice. The jury answered the first question in the negative; and as to the second, they said they thought "malice" a strong word, but found, that the defendant acted from improper motives, and with a view of suppressing the plaintiff's evidence. The judge held, that this was malice, and that there was no reasonable and probable cause; and the Courts of Queen's Bench and Exchequer Chamber upheld the ruling (d). An incorporated railway company is not liable to an

(y) *Johnstone v. Sutton*, 1 T. R. 544, 545. See *Michell v. Williams*, 11 M. & W. 205.

(z) Per Lord Mansfield, C. J., and Lord Loughborough, C. J., in *Sutton v. Johnstone*, 1 T. R. 545, and per Tindal, C. J., delivering judgment, *Willans v. Taylor*, 6 Bingh. 186.

(a) Per Lord Tenterden, C. J., delivering judgment of the court in *Cotton v. James*, 1 B. & Ad. 133.

(b) Per Lord Tenterden, C. J., *Blachford v. Dod*, 2 B. & Ad. 184, cited arg. *James v. Phelps*, 11 A. & E. 483. See further on this subject, *M'Donald v.*

Rooke, 2 B. N. C. 217; *Panton v. Williams*, in error; 2 Q. B. 169; 1 G. & D. 504; *Broad v. Ham*, 5 B. N. C. 722; *Rowland v. Samuel*, 11 Q. B. 39; S. C. 17 L. J., Q. B. 65.

(c) *Panton v. Williams*, 2 Q. B. 169.

(d) *Hadrick v. Heslop*, 12 Q. B. 267; S. C. 17 L. J. 313; (on error), S. C. nom. *Heslop v. Chapman*, 23 L. J., Q. B. 49. See also *Douglas v. Corbett*, 6 E. & B. 511; and *Weston v. Beeman*, 27 L. J., Ex. 57, where the prosecution was not commenced by the defendants, but only continued by them.

action for a malicious prosecution in respect of a criminal proceeding instituted by their servant without their knowledge or direction (e). There is a material distinction as to liability for malicious prosecution between the institution of the prosecution and its continuance after it has been already instituted without authority by an agent: and the absence of reasonable and probable cause which might be evidence of malice in the one case, will not be so in the other. Where, therefore, the party put in possession under a bill of sale had issued a summons against the assignor for feloniously stealing some of the chattels assigned, and the assignees attended the hearing, and allowed the case to be opened in their behalf as prosecutors; it was held, that the absence of reasonable and probable cause would not be evidence of malice as against them (f).

By analogy to the action for a malicious prosecution (g), the law in modern times has permitted an action to be maintained for maliciously arresting or holding a party to bail, either where there is not any debt due, or where the party is held to bail for a larger sum than is really due. As in the analogous action for a malicious prosecution, it must appear that the prosecution is determined (h); so in the action for a malicious arrest, it must be stated in the declaration, that the first action has been determined. This allegation must also be proved (i); and it is not sufficient for this purpose to put in a judge's order to stay proceedings on payment of costs, and to prove that the costs were paid accordingly (k). But proof that no declaration was filed or delivered within a year after the return of the writ is sufficient (l) to show a determination of the suit. The termination must be such as to furnish *prima facie* evidence that the action was without foundation. Termination of cause by *stet processus*, by consent of parties, is not sufficient (m). So in an action for a malicious presentment in the Ecclesiastical Court, it must appear that the presentment has been determined (n). To support an action for a malicious arrest, malice, and that the arrest was without probable cause, must be alleged and proved (o). The mere not proceeding in an action is not evidence of itself alone sufficient to support this action (p). But where there are mutual dealings between two parties, and items known to be due on each side of the account, an arrest for the amount of one side of the account without deducting what is due on the other, is

(e) *Stevens v. Midland Counties Railway Co.*, 10 Ex. 352; 23 L. J., Ex. 328.

(f) *Weston v. Beeman*, 27 L. J., Ex. 57. As to what is evidence of want of reasonable and probable cause, see *Huntley v. Simson*, 27 L. J., Ex. 134.

(g) Admitted in *Goslin v. Wilcock*, 2 Wils. 305, per Lord Camden, C. J.

(h) *Parker v. Langley*, Gilb. R. 163, adjudged on special demurrer.

(i) *Norrish v. Richards*, 3 A. & E. 733;

5 Nev. & M. 268; *Combe v. Capron*, 1 M. & Rob. 398.

(k) 1 Esp. N. P. C. 80.

(l) *Pierce v. Street*, 3 B. & Ad. 397.

(m) *Wilkinson v. Howel*, M. & Malk. 495, *Tenterden*, C. J., confirmed by court.

(n) *Fisher v. Bristow*, 1 Doug. 215.

(o) *Roret v. Lewis*, 17 L. J., Ex. 98; *De Medina v. Grove*, 10 Q. B. 152.

(p) *Sinclair v. Eldred*, 4 Taunt. 7.

malicious, and without probable cause (*q*). So where A. arrested B. on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and afterwards discontinued the action and paid the costs; it was held that this was sufficient *prima facie* evidence of malice, and of the absence of probable cause (*r*). A., to whom a sum of money was owing from B., sued out a writ against B., for the purpose of holding him to bail: before the writ was served, B. went to the house of A., and paid the debt, but A. did not immediately after such payment countermand the writ; in consequence of which B. was arrested, and kept in prison for several hours: B. thereupon brought an action against A., alleging, that after payment of the debt, it became the duty of A. to have countermanded the writ, and that he had wrongfully neglected so to do, by reason whereof he was arrested: it was held, that the action would not lie: *Eyre*, C. J., observing, that the plaintiff ought to have inquired at the time when he paid the debt, whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to have requested a countermand which he might take to the sheriff. And *Heath*, J., said, "This action is founded on mere nonfeasance, and no case or precedent has been cited to show that such an action was ever maintained." All the cases of arrest, and holding to bail without cause, are founded on malice (*s*). In like manner it has been held, that evidence of suing out a writ and arresting a party thereon, after the debt has been discharged and a receipt given, will not be sufficient to maintain an action of this kind in a case where actual malice was not proved, and the facts of the case precluded any inference of malice (*t*). Malice is a question of fact for the jury, and the jury *may* (*u*), but are not *bound*, to imply malice from want of probable cause.

An action for maliciously arresting on a *capias* issued by a judge's order under 1 & 2 Vict. c. 110, s. 3, lies only where the party obtaining the order for the *capias* has imposed on the judge by some false statement, or *suggestio falsi*, and thereby satisfied him of the existence of the debt to the requisite amount, and that there was reasonable ground for supposing that the debtor was about to quit the country (*x*). An action lies at the suit of a debtor taken in execution under a writ of *ca. sa.* upon a judgment against an execution creditor, who "maliciously and without any reasonable or probable cause" causes and procures a warrant to be issued upon the said writ indorsed to levy a larger sum than remained due upon the judgment, and the debtor to be taken to

(*q*) *Austin v. Debnam*, 3 B. & C. 139.

(*r*) *Nicholson v. Coghill*, 4 B. & C. 21.

(*s*) *Scheibel v. Fairbairn*, 1 B. & P. 388, recognized in *Page v. Wiple*, 3 East, 317, and *Lewis v. Morris*, 4 Tyr. 914. See also *Saxon v. Broune*, 6 A. & E. 652; *Heywood v. Collinge*, 9 A. & E. 268; *Watson v. Whitmore*, 14 L. J.,

Ex. 41.

(*t*) *Gibson v. Chaters*, 2 B. & P. 129.

(*u*) *Mitchell v. Jenkins*, 5 B. & Ad. 588.

(*x*) *Daniels v. Fielding*, 16 M. & W. 200. See also *Ross v. Norman*, 5 Ex. 359; 19 L. J., Ex. 329; *Gibbons v. Allison*, 3 C. B. 181.

satisfy such sum: and it is a sufficient allegation of damage in such an action that the plaintiff was imprisoned on the warrant until he could procure his discharge, that he was thereby prevented from attending to his business, and injured in his credit, and was put to costs in obtaining his liberation from the imprisonment (y).

An action on the case has been held to be maintainable for maliciously impleading and causing the plaintiff to be excommunicated in the Ecclesiastical Court, whereby he was taken upon an *excom. cap.* and imprisoned, until he procured himself to be absolved (z). The plaintiff declared, that the defendant had sued out a *fi. fa.* upon a judgment given against the plaintiff for the defendant in an action of trespass, under which the sheriff took goods of the plaintiff to the value of the damage, and returned that the goods remained in his hands for want of purchasers, and that the defendant, *well knowing this*, to the intent to vex the plaintiff, sued out another *fi. fa.*, under which the sheriff levied the money on other goods of the plaintiff, and paid it over to the defendant. After Not Guilty pleaded, and verdict for plaintiff, it was held, on motion in arrest of judgment, that the action was maintainable: *Hobart*, C. J. (who delivered the opinion of the court), observing, that the plaintiff was twice vexed *wilfully* by the defendant, who had first one execution inchoate, which he ought to have completed, *knowing it*, and not to have taken another: for else he might take twenty executions (a). An action on the case will lie against a governor for maliciously, and without probable cause, suspending plaintiff from a civil office (b). So an action will lie for falsely and maliciously suing out a commission of bankruptcy against the plaintiff, which was afterwards superseded (c). So where an adjudication of bankruptcy had been made on an affidavit of the defendant containing statements which were not true in fact, it was held that an action lay against him for falsely and maliciously causing the plaintiff to be made a bankrupt, although the adjudication was bad upon the ground that the affidavit was insufficient in not showing that an act of bankruptcy had been committed (d). It seems, that the mere order for annulling the fiat is not evidence of want of probable cause, as that may have proceeded on strict legal grounds (e). An action will not lie against a person exhibiting an information for intention to land goods without paying duty, if the goods are condemned by the sub-commissioners, though the commissioners of appeal reverse the condemnation; for the judgment of the sub-commissioners shows

(y) *Churchhill v. Stiggers*, 3 E. & B. 929; S. C. 24 L. J., Q. B. 308.

(z) *Hocking v. Matthews*, 1 Vent. 86.

(a) *Waterer v. Freeman*, Hob. 205, 266; 1 Brownl. 12.

(b) *Sutherland v. General Murray*, 1 T. R. 538.

(c) *Chapman v. Pickersgill*, 2 Wils.

145. See *Whitworth v. Hall*, 2 B. & Ad. 695.

(d) *Farley v. Danks*, 4 E. & B. 493; 24 L. J., Q. B. 244.

(e) See the opinion of *Tindal*, C. J., as to the effect of a mere supersedeas, *Hay v. Weakley*, 5 C. & P. 361.

that there was a foundation for the information (*f*). A., a captain in the navy, was accused, by his commander-in-chief, of neglect of duty, disobedience of orders, &c. A., having been tried by a court-martial, was honourably acquitted, after which he brought an action in the Court of Exchequer, against his commander, for a malicious prosecution. A verdict having been found for the plaintiff, a motion was made in arrest of judgment, which, after a very elaborate discussion, was refused (*g*); but the defendant afterwards brought a writ of error in the Exchequer Chamber, where the judgment of the Court of Exchequer was reversed (*h*). This reversal was afterwards affirmed in the House of Lords (*i*). An action will not lie to recover damages sustained by the plaintiff in defending a vexatious ejectment brought against him by the defendant, in which the nominal plaintiff has been non-prossed (*j*).

Not only is a person liable when he of his own accord maliciously and without a reasonable cause prosecutes another, but also where a judge, induced by his wrongful and malicious act, commits another, and orders him to be indicted, although the wrongful act was committed for an entirely collateral purpose, and without the slightest intention of inducing the judge to put the law in motion. A. sued B. in the county court for a debt, B. claimed a set-off, in answer to which A. produced his ledger, containing an acknowledgment as he swore by B.; B. denied the signature, which he averred was a forgery. The judge, induced partly by the statement of A., and partly by the conduct of B. before him, disbelieving B.'s denial, committed him for trial for perjury, under the 14 & 15 Vict. c. 100, s. 19, and bound A. over to prosecute. B. was accordingly tried for perjury, and acquitted. Thereupon B. brought an action against A. for maliciously and without probable cause, causing him to be prosecuted on an unfounded charge. The Court of Common Pleas held, that the action would not lie, the committal of B. and the binding over to prosecute being the act of the judge; but the Exchequer Chamber reversed this judgment, and held that the action was maintainable, the committal of B. and his prosecution for perjury being the result of the wrongful and malicious act of A. (*k*).

The arrest by a sheriff under a writ from any of the Queen's courts of a person privileged from arrest by reason of attendance as a witness under the proviso of another court, although alleged to have been done wrongfully and maliciously, does not form the

(*f*) *Reynolds v. Kennedy*, 1 Wils. 232, on error from Ireland.

(*g*) *Sutton v. Johnstone*, 1 T. R. 501.

(*h*) *Ibid.* 550.

(*i*) 1 Bro. P. C. 76, Tomlins' edit.

(*j*) *Purton v. Honnor*, 1 B. & P. 205.

Under what circumstances an action will lie for a malicious and vexatious suit, see notes on Co. Litt. 161, a. (4) IV., and

Martin v. Lincoln, M. 27 Car. II. C. B., Bull. N. P. 13.

(*k*) *Fitzjohn v. Mackinder*, 9 C. B. (N. S.) 505, in error; 30 L. J., C. P. 257 (per Cockburn, C. J., and Bramwell and Channell, BB., Wightman and Blackburn, JJ., *dissentientibus*; reversing the decision of Erle, C. J., and Williams, J., *Willes, J., dissentiente*).

ground of any action at law, but is only the subject of an application to the court under whose authority the party has been compelled to appear as a witness (*l*).

II. Of the Declaration.

Defence, p. 1012.

Evidence, p. 1013

The declaration must state all the material circumstances attending the malicious prosecution, and how it was disposed of (*m*); because, until that be determined, it cannot be known whether the prosecution were malicious or not (*n*), and this absurdity might follow, that plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution. The want, however, of this averment is cured by verdict (*o*), because it will be presumed that it has been proved at the trial (*p*). But the want of an allegation of malice is not cured by verdict, but judgment will be arrested (*q*). If it appear on the face of the declaration that the court in which the indictment was tried had authority to hear and determine upon it, it is sufficient (*r*).

Defence.

Money cannot be paid into court (*s*). The usual defence to this action is, that the defendant had reasonable or probable grounds of suspicion against the plaintiff. It is not necessary that these grounds should be legal grounds; for if it can be inferred, from the circumstances of the case, that the defendant was not actuated by any improper motive, but an honest desire to bring a supposed offender to justice, it will be a sufficient answer to this action; because such circumstances tend to disprove that which is of the essence of the action, *viz.*, the malice of the defendant in preferring the charge (*t*). This defence of probable cause ought not to be pleaded specially by the defendant, inasmuch as it may be given in evidence under the general issue, Not Guilty (*u*). In case for a malicious arrest, the plea of Not Guilty puts in issue merely the malicious arrest without probable cause; the aver-

(*l*) *Magnay v. Burt*, 5 Q. B. 381; and see *Yearsley v. Heane*, 14 M. & W. 322, and *Ewart v. Jones*, 14 M. & W. 774.

(*m*) *Arundell v. Tregono*, Yelv. 116.

(*n*) *Lewis v. Farrell*, Str. 114; *Parker v. Langley*, Gilb. R. 163.

(*o*) *Skinner v. Gunton*, 1 Saund. 228.

(*p*) *Per Denison, J.*, in *Panton v. Marshall*, B. R. M. 28 Geo. II., MSS.

(*q*) *Saxon v. Castle*, 6 A. & E. 652.

(*r*) *Busby v. Watson*, 2 Bl. 1050;

Barnes v. Constantine, Yelv. 46.

(*s*) 15 & 16 Vict. c. 76, s. 70.

(*t*) *Coxe v. Wirrall*, Cro. Jac. 193, cited by *Tindal, C. J.*, in delivering judgment in *Panton v. Williams*, in Exch. Chamb., 2 Q. B. 169; *ante*, p. 1007. See also *Philips v. Naylor*, 27 L. J., Ex. 222.

(*u*) *Hounsfield v. Drury*, 11 A. & E. 98; and see Pleading Rules, H. T. 1853, r. 16.

ment of the discontinuance of the suit is a material allegation, which should be denied specially (*u*). So the alleged acquittal of the plaintiff (*v*). In an action for maliciously proceeding to outlawry, which was afterwards reversed, the general issue, Not Guilty, only puts in issue the existence of reasonable and probable cause, and not the reversal of the outlawry (*x*). In case for maliciously, and without probable cause, laying an information on the Game Laws, it appeared that there had been a conviction and no appeal. The court held, that as the defendant had acquiesced in the conviction, this was evidence of probable cause; and so the action could not be maintained (*y*).

To a declaration for procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon without any reasonable or probable cause, the defendant pleaded, that he the defendant procured the charge to be made "upon and with a reasonable and probable cause;" and then proceeded to state what that reasonable and probable cause was, and in so doing alleged the several circumstances attending the transaction out of which the charge before the magistrate arose. Special demurrer, alleging, that the plea did not contain any allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on, those circumstances. The court held the plea bad, not in form only, but in substance, on this ground of objection (*z*). The defendant had indicted the plaintiff for felony for maliciously obstructing the air-way of a mine; it appeared that the plaintiff had committed the act in question under a claim of right and *bonâ fide*. In an action by the plaintiff for a malicious prosecution, it was held, that the judge ought to have left it to the jury to say whether the defendant knew, at the time of preferring the indictment, that the plaintiff had done the act under a claim of right, and *bonâ fide*, for then there was not any probable cause for a charge of felony (*a*).

The debtor's going abroad after an arrest for debt is probable cause for the creditor's proceeding to outlawry, notwithstanding the creditor may know that the debtor has an agent in England (*b*).

Evidence.

If the prosecution were by way of indictment, the plaintiff must produce an examined copy, or a copy purporting to be certified (*c*), of the record of the indictment; and, where there has been a ver-

(*u*) *Watkins v. Lee*, 5 M. & W. 270.

(*v*) *Hadrick v. Heslop*, 12 Q. B. 267; 17 L. J., Q. B. 313.

(*x*) *Drummond v. Pigou*, 2 B. N. C. 114, recognized in *Atkinson v. Raleigh*, 3 Q. B. 79.

(*y*) *Mellor v. Baddeley*, 2 Cr. & M. 675.

(*z*) *Delegal v. Highley*, 3 B. N. C. 950.

(*a*) *James v. Phelps*, 3 P. & D. 231; 11 A. & E. 483.

(*b*) *Drummond v. Pigou*, 2 B. N. C. 114; 2 Scott, 228.

(*c*) 14 & 15 Vict. c. 99, s. 13.

dict of Not Guilty, of the acquittal; and the record is conclusive evidence for the plaintiff to establish the fact of acquittal where that is put in issue (*d*).

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpoena duces tecum*, to produce the proceedings. If the information was laid by the defendant, his taking the oath and handwriting should be proved, as also the issuing the warrant to the constable, &c.; the warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant; and his ultimate discharge must also be shown (*e*).

An averment, that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid (*f*). So where a suit was determined by a rule of court; it was held, that the production of the rule of court was sufficient evidence of that fact (*g*).

This action cannot be maintained without proof of malice, either express or implied. Malice may be implied from the want of probable cause, but that must be shown by the plaintiff (*h*). Proving an acquittal for want of prosecution is not *prima facie* evidence of malice to support this action (*i*). The absence of proof on the part of the plaintiff, that the defendant did not believe at the time he prosecuted the plaintiff, that his conduct, which was the ground of accusation, did not amount to the offence charged, is not supplied by evidence that the defendant made use of the charge, as a means of obtaining an unfair advantage over the plaintiff (*j*). A declaration alleging that the defendant maliciously and without probable cause preferred an indictment against the plaintiff for perjury, is supported by proof that some of the assignments of perjury in the indictment were preferred without probable cause: and the plaintiff's counsel having stated that he should offer no evidence as to the transactions to which the other assignments of perjury related, it was held, that the defendant was not at liberty to give evidence to show that there was probable cause for those other assignments of perjury (*k*). In an action for a malicious prosecution of indictment for perjury, the plaintiff was allowed to give in evidence an advertisement put into the papers by the defendant of the finding of the indictment, with other scandalous matter, although an information had been granted for it as a libel; not, as he said, that the jury were to consider it in damages, but only as a circumstance of malice (*l*). In an action for a malicious prose-

(*d*) *Legatt v. Tollervey*, 14 East, 302.

(*e*) 2 Stark. Law of Slander and Libel, 70, 71 (2nd edit.).

(*f*) *Bristow v. Heywood*, 1 Stark. N. P. C. 48; 4 Campb. 214, S. C. But see *Watkins v. Lee*, 5 M. & W. 270.

(*g*) *Brook v. Carpenter*, 3 Bingh. 297.

(*h*) *Turner v. Ambler*, 10 Q. B. 252.

(*i*) *Purcell v. Macnamara*, 9 East, 361. See *ante*, p. 1008.

(*j*) *Turner v. Ambler*, 10 Q. B. 252.

(*k*) *Ellis v. Abrahams*, 8 Q. B. 709.

(*l*) *Chambers v. Robinson*, Str. 691.

cution for forging a note of hand, four witnesses proving that the handwriting was not the plaintiff's, the judge directed the jury in his favour (*m*). Where a person prosecutes on the representations of others, he should show that he did all he could, or used proper and reasonable means and precaution, to discover the truth, and that he acted on a belief that he was right; otherwise the want of probable cause will subject him to the imputation of malice, and consequently to this action. MSS. It must appear that the plaintiff was acquitted upon the prosecution *before* the action was brought; but the day of the acquittal is not material (*n*). In an action for maliciously indicting plaintiff and others for a conspiracy (*o*), one of the grand jury, before whom the bill of indictment had been preferred, and found a true bill, was called to prove that the defendant was the prosecutor of the indictment; and *Kenyon*, C. J., being of opinion that the question was one of fact, the disclosure of which did not infringe upon the grand jurymen's oath, permitted him to be examined as to that point (*p*). Case for a malicious prosecution of an indictment, whereof (as was alleged) plaintiff was *legitimo modo acquietatus*; upon the trial it appeared, that he was acquitted no otherwise than by an entry of a *nolle prosequi*. *Per Cur.* "This evidence does not support the declaration; for the *nolle prosequi* is a discharge as to the indictment, but it is not an acquittal of the crime (*q*).

If two are found guilty, it must be of joint acts, and the damages must be joint (*r*). In an action for malicious prosecution for perjury, where there had been thirty-three assignments, the defendant proved, that he had probable cause for many of the charges; but as he had known one of them to be false, Lord *Mansfield*, C. J., held that the plaintiff should recover for that one, though there was probable cause for the others. Jury found 100*l*. damages for the plaintiff (*s*). In an action for a malicious arrest, the plaintiff cannot recover damages for the extra costs (*t*). But in an action for a malicious prosecution for conspiracy, where the plaintiff has made himself liable for, and has paid the costs of himself and others jointly indicted with him, he may recover the whole amount of these costs as damages (*u*).

(*m*) *Norris v. Tyler*, Cowp. 37.

(*n*) *Purcell v. Macnamara*, 9 East, 157. See also *Stoddart v. Palmer*, 3 B. & C. 2.

(*o*) *Sykes, Gent., one, &c. v. Dunbar*, Middlesex Sittings after M. T. 40 Geo. III., *Kenyon*, C. J., MSS. See the remarks of Mr. Starkie on this case in vol. 2, p. 70, n. (*p*), of the second edition of his valuable treatise on Slander and Libel.

(*p*) *Ibid.*

(*q*) *Goddard v. Smith*, Salk. 51; 6

Mod. 261.

(*r*) *Hilditch v. Eyles*, H., 29 Geo. III., coram *Wilson*, J., Guildhall, MSS.

(*s*) *Prosser v. Nixon*, cited in *Sutton v. Johnstone*, 1 T. R. 533. See *Ellis v. Abrahams*, 8 Q. B. 709.

(*t*) *Sinclair v. Eldred*, 4 Taunt. 7, recognized by *Best*, C. J., in *Webber v. Nicholas*, Ry. & Moo. 419. *Contra*, per Lord *Ellenborough*, C. J., in *Sandback v. Thomas*, 1 Stark. N. P. C. 306.

(*u*) *Rowlands v. Samuel*, 11 Q. B. 39; 17 L. J., Q. B. 65.

CHAPTER XXVIII.

MANDAMUS.

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I. *Nature of the Writ of Mandamus.*

THE writ of mandamus is a prerogative writ, containing a command in the king's name, and issuing from the Court of King's Bench, directed to persons, corporations, or inferior courts of judicature within the king's dominions, requiring them to do a certain specific act, as being the duty of their office, character, or situation, agreeably to right and justice. This writ affords a proper remedy, in cases where the party has not any other means of compelling a specific performance. The object of the writ is not to supersede legal remedies, but only to supply the defect of them. The only proper ground of the writ is a defect of justice. It is, however, a prerogative writ, and not a writ of right (a), and it is the absence or want of a specific legal remedy, which gives the court jurisdiction (b). There must be a specific legal right, as well as the want

(a) *Per Ashhurst, J.*, in *R. v. Commissioners of Excise*, 2 T. R. 385.

(b) *Per Lord Ellenborough, C. J.*, *Bristol Dock Company*, M. 52 Geo. III., MS. See also the opinion of *Buller, J.*, in *R. v. Marquis of Stafford*, 3 T. R. 652; *Exp. Napier*, 18 Q. B. 695; 18 L.

J., Q. B. 692. *Quære*, whether a mandamus will lie in any case where the right is merely equitable. *R. v. Balby and Workop Trustees*, 1 B. C. C. 134; 22 L. J., Q. B. 164; and *per Lord Campbell, C. J.*, 1 E. & B. 92.

of a specific legal remedy, in order to found an application for a mandamus (c). And there must have been a direct refusal to do that, which it is the object of the mandamus to enforce, either in terms, or by circumstances, which distinctly show an intention in the party not to do the act required (d). It is no objection, however, to the granting a mandamus to do a particular act, that an indictment will also lie for the omission to do that act (e). But the court will not carry the remedy by mandamus so far as to issue the writ, wherever any officer has neglected his duty (f). "There is considerable doubt, whether, when an inferior officer refuses to do his duty, he being amenable to other persons, this court will under any circumstances, interfere by mandamus" (g). The power to issue this writ belongs exclusively to the Court of King's Bench, and is considered as one of the flowers of that court (h). It has of late years been the practice to enlarge the application of the remedy by mandamus (i), but the court will not extend it to a case to which it is not applicable, on the objection being waived by the parties (k). The court will not grant a mandamus where the party has a not less effectual remedy by action (l). The writ will be bad if it be shown that the party has not the power to do the act required (m).

By the 6 & 7 Vict. c. 89, s. 5, provision is made for expediting certain proceedings by way of mandamus and *quo warranto*, so far as they affect corporate offices in boroughs: see this section, *post*, tit. "*Quo warranto*."

II. *Mandamus to restore or admit Persons to Corporate Offices.*

A mandamus lies either to restore a person wrongfully ousted, or to admit a person wrongfully refused (n). A mandamus lies

(c) *Per* Lord Ellenborough, C. J., in *R. v. Archbishop of Canterbury*, 8 East, 219. See also *Coleridge, J.*, in *R. v. Nottingham Old Water Works Company*, 6 A. & E. 372.

(d) *R. v. Brecknock and Abergavenny Canal Company*, 3 A. & E. 217; 4 Nev. & M. 871; recognized in *R. v. Bristol and Exeter Railway*, 4 Q. B. 162; *R. v. Ford*, 2 A. & E. 588. See also *R. v. Wilts and Berks Canal Navigation*, 3 A. & E. 477; *R. v. Norwich and Brandon Railway*, 3 D. & L. 385.

(e) *R. v. The Severn and Wye Railway*, 2 B. & A. 646. See also *R. v. Commissioners of Dean Inclosure*, 2 M. & S. 80, cited and commented on by *Denman, C. J.*, 3 A. & E. 422, *R. v. Jeyes*.

(f) *R. v. Jeyes*, 3 A. & E. 416; 5 Nev. & M. 101. See *R. v. Payn*, 6 A. & E. 400.

(g) *Per* *Denman, C. J.*, *S. C.* See *R. v. Gamble*, 11 A. & E. 69.

(h) Poph. 176.

(i) *Per* *Coleridge, J.*, in *Norris v. Irish Land Company*, 8 E. & B. 512; 27 L. J., Q. B. 119, *S. C.*

(k) *Per* Lord Campbell, C. J., 16 Q. B. 359.

(l) *R. v. The Hull and Selby Railway*, 6 Q. B. 70; *R. v. Ponsford*, 1 D. & L. 116; *R. v. The Bristol and Exeter Railway*, 3 Rail. Cas. 777.

(m) *R. v. The London and North Western Railway*, 16 Q. B. 864; *R. v. Ambergate Railway*, 1 E. & B. 372; *R. v. Great Western Railway*, 1 E. & B. 253.

(n) As to where mandamus and where *quo warranto* should be resorted to, see *post*, p. 1021.

to restore a person who has been removed from his office without cause; as a mayor, bailiff (*o*), alderman (*p*), Burgess (*q*), jurat (*r*), common council-man, recorder (*s*), town-clerk (*t*), or serjeant (*u*). Formerly, in these cases, the writ was termed "a writ of restitution," and appears to have been confined exclusively to offices of a public nature. The title "mandamus" is not found in the old abridgements. By an extension of the ancient writ of restitution, a remedy has been provided for persons who have been duly elected to offices, although they never had possession. Hence a mandamus lies to *admit*, as well as to restore, a person to his office, as a mayor, alderman (*x*), town-clerk (*y*), &c. It was said that the admission under the mandamus gives no right, but only a legal possession, to enable the party to assert his right, if he has any. Hence *non fuit electus* was at one time held not to be a good return to a mandamus to swear in a churchwarden, because it was said it was directed only to a ministerial officer who was to do his duty, and no inconvenience could follow; for if the party had a right, he ought to be admitted; if he had not, the admission would do him no good. Wherever the officer is but ministerial, he is to execute his part it was said, let the consequence be what it would (*z*). But these cases have long since been overruled, and there is no doubt that the return may deny any material allegation in the suit (*a*). Where there are two sets of parties, who have each a colourable title to the office of churchwarden, both sets must be sworn in (*b*).

By the common law, upon the death or removal of a duly chosen mayor, or other chief magistrate of boroughs or corporations within the year, the Court of King's Bench was authorized to grant a mandamus immediately to fill up the vacancy thus occasioned (*c*); but, upon an omission to elect at the charter-day (*d*), or to such acts as were by the charter required to be done at certain times, in order to complete the election, or upon the removal of an officer unduly chosen, the court had not any

(*o*) 2 Roll. Abr. tit. Restitution, pl. 4.

(*p*) *Shuttleworth v. Corporation of Lincoln*, 2 Bulstr. 122; *Taylor's case*, Poph. 133, S. P.

(*q*) *Clerk's case*, Cro. Jac. 506. See also 5 Mod. 257.

(*r*) *Anon.*, 1 Lev. 148.

(*s*) 2 Roll. Abr. tit. Restitution, pl. 8.

(*t*) Pasch. 2 Car., said to have been adjudged. See Sty. 457; *R. v. Champion*, 1 Sid. 14.

(*u*) 2 Roll. Abr. tit. Restitution, pl. 7.

(*x*) Com. Dig. Mandamus (A).

(*y*) *Awdeley v. Joye*, Poph. 176.

(*z*) *R. v. White*, M. 11 Geo. I. (cited by *Strange, arg.*, Str. 894, 895); *R. v. Simpson*, St. 895.

(*a*) *R. v. Williams*, 8 B. & C. 681.

See *post*, p. 1037.

(*b*) *R. v. Archdeacon of Middlesex*, 5 Nev. & M. 497; 3 A. & E. 615; *Exp. Duffield and another*, 3 A. & E. 617; *Exp. Mawby*, 3 E. & B. 720.

(*c*) See 8 Mod. 129.

(*d*) By 5 & 6 Will. IV. c. 76, (amended by 7 Will. IV. & 1 Vict. c. 78, 5 & 6 Vict. c. 104, 6 & 7 Vict. c. 89, 16 & 17 Vict. c. 79,) for the regulation of municipal corporations in England and Wales, sect. 1, all charters, grants and letters patent, relating to the several boroughs named in the Schedules (A) and (B), inconsistent with that act, are repealed. By sect. 49, the council in every year are to elect the mayor on the 9th of November, and in case of vacancy

power to compel an election, or the performance of such acts as were necessary to complete an election, before the day came round again ; for to compel the corporation to proceed to an election at another day, would not be enforcing obedience to the king's charter, but to authorize them to act in opposition to it. The omission to elect might be owing to the contrivance of the person who ought to hold the court, or to preside in the assembly where the election was to be made ; or it might be the effect of pure accident : in either case, the inconvenience was the same : a forfeiture of the charter might be incurred, and the corporation dissolved, in consequence of such omission (*e*). To remedy the mischiefs which might thus arise, it was enacted by 11 Geo. I. c. 4, s. 1 (*f*), That if any city, borough, or town corporate, in England, Wales, and Berwick-upon-Tweed, no election shall be made of the mayor, bailiff, or other chief officer, upon the day or within the time appointed by the charter or usage, or such election being made, shall afterwards become void, whether such omission or avoidance shall happen through the default of the officer who ought to hold the court or preside, or by any accident or other means, the corporation shall not thereby be dissolved or disabled from electing such officers ; *in any case where no election shall be made as aforesaid*, the members of the corporation may meet at the town-hall or other usual place of meeting for making such election, upon the next day after the expiration of the time within which such election ought to have been made, unless such day shall be Sunday, and then on the Monday following, between the hours of ten in the morning and two in the afternoon (*g*), and proceed to an election ; and in case the mayor or other person, who ought to hold the court or preside, shall be absent, the nearest in place or office having

within the year, then another election is to be made within ten days after the vacancy. In *Reg. v. Macgowan*, 3 P. & D. 557, 11 A. & E. 869, it was held, that the election of mayor on the 9th of November, in each year, must be the first business done by the town council, and that an election of aldermen on that day previous to the election of mayor is void. By 6 & 7 Will. IV. c. 105, s. 4, the mayor shall continue in office one whole year, and until his successor shall have accepted the office of mayor, and shall have made and subscribed the declaration required in that behalf.

(*e*) See the case of *The Corporation of Banbury*, 10 Mod. 346, cited from a MS. note by Lord Hardwicke, C. J., in *R. v. Pasmore*, 3 T. R. 221 ; *R. v. Tregony*, 8 Mod. 127. See also the report of the attorney-general and solicitor-general, in 1724, in the *Tiverton case*, 2 Doug. Controverted Elections, p. 63, edit. 1775. Note. The cases of *Banbury* and *Tiverton*

gave rise to the stat. 11 Geo. I. c. 4, founded on a constitutional jealousy, lest the crown should have it in their power to model all corporations upon the death of mayors, &c.

(*f*) By 7 Will. IV. & 1 Vict. c. 78, s. 76, all the powers of this act of 11 Geo. I., given to the Court of King's Bench, are extended to elections under the 5 & 6 Will. IV. c. 76, and this act of 7 Will. IV. & 1 Vict. c. 78. See *R. v. Mayor of Lichfield*, 1 Q. B. 453 ; 1 G. & D. 28 ; *R. v. Mayor of Weymouth*, 7 Q. B. 46 ; *R. v. Mayor of Rochester*, 7 E. & B. 910 ; *R. v. Harwich*, 1 E. & B. 617.

(*g*) "I think the time is not essential ; but only directory. It was appointed to prevent surprise : and if the election be fairly carried on, though at a different hour, yet such election is good." Per Lord Hardwicke, C. J., in *R. v. Pole*, B. R. Trin. 7 & 8 Geo. II., MS. The language of Lord Hardwicke, in another

a right to vote shall hold the court or preside. And by sect. 2, If in any city, borough, or town corporate, in England, Wales, and Berwick-upon-Tweed, no election shall be made of the mayor, bailiff, or other chief officer, upon the day or within the time appointed by charter or usage for that purpose, and no election of such officer shall be made, pursuant to the directions hereinbefore prescribed, or such election being made shall afterwards become void as aforesaid, in every such case his Majesty's Court of King's Bench may, upon motion, award a writ of mandamus requiring the members or persons having a right to vote at, or to do any act necessary to be done in order to such election, respectively to assemble themselves at the time prefixed in the writ, and to proceed to the election of a mayor, bailiff, or other chief officer, as the case shall require, and to do every act necessary to be done in order to such election; or to signify to the court good cause to the contrary, and thereupon to cause such proceedings to be had as in any other cases of mandamus for election of officers of corporations; and of the time appointed by such writ of mandamus for holding such assembly, public notice in writing shall, by such person as the court shall appoint, be affixed in the market-place, or some other public place within such city, &c., six days before the day so appointed: and such officer, or other person respectively, shall preside in such assembly as ought to have presided in case the same had been made upon the day hereinbefore prescribed for that purpose.

Lastly, the persons to whom the mandamus is directed, are to make their return to the first writ (*h*). Such are the enactments and provisions of the 11 Geo. I. c. 4, and "being a remedial law to prevent the inconveniences that may arise, by any accident, from non-elections, if the parliament uses such words in an act that will take in other cases within the same mischief, the court ought to construe such kind of acts as liberally as possible" (*i*). Hence the court will grant a mandamus under this statute, to compel the members of a corporation to proceed to the election of a mayor, although more than one year, *e. g.* three or four years, have elapsed since a regular election (*k*). The statute is not confined to annual officers (*l*). And the court will grant a mandamus, not only

note, is thus: "As to the hours, they are merely directory to prevent surprise; and so resolved in the case of *The Corporation of Launceston*, 1 R. A. 513, 514, pl. 5." The distinction between matters directory and obligatory is well known and established. *Per Lord Tenterden*, C. J., delivering judgment of court in *R. v. Mayor of London*, 9 B. & C. 31; *R. v. Mayor of Norwich*, 1 B. & Ad. 310, *R. v. Mayor of Rochester*, 7 E. & P. 910.

(*h*) Sect. 9.

(*i*) *Per Lord Hardwicke*, C. J., in *R. v. Pole*, *sup.*, note (*g*).

(*k*) *R. v. Burgesses of the Borough of Oxford*, M. 9 Geo. II., MS., Bull. N. P. 201; 34 MS. Serjeant Hill, p. 263, *S. C.*, there said by the court, that the *Corporation of Macclesfield*, T. R. 11 Geo. I., was an authority in point.

(*l*) *R. v. The Mayor and Burgesses of Thetford*, 8 East, 270.

for the head officer (*m*), but also for others who are necessary constituent parts of the corporation (*n*).

The words in the first section of the statute, "no election," are to be construed "no legal election;" and consequently, although there has been an election *de facto*, the court has a discretionary power, upon considering all the circumstances of the election, to award or not to award a mandamus, as the justice of the case may require (*o*). If the legality of the election, *de facto*, be doubtful, and fit to be tried by information in nature of *quo warranto*, the court will not award a mandamus (*p*); but if it appear clearly that the election was illegal, or a merely colourable and void (*q*) election, the court will grant a mandamus; for in such case it would be nugatory to try the legality of the election in an information in the nature of *quo warranto* (*r*). Thus, where by custom the rector of a parish nominated one churchwarden and the parishioners the other, and the rector nominated a person who was not a resident, nor the occupier of any house or land in the parish, and the person so nominated was afterwards sworn into office, and it was desired to test the validity of the appointment on the ground that the person appointed was not legally qualified, it was held, that an application for a *mandamus* to the rector to nominate a churchwarden was a proper course for that purpose, and that a *quo warranto* does not lie for usurping the office of a churchwarden (*s*). But it is "an inflexible rule in corporation law that, where a man has accepted office and is in, unless the election be colourable, and so merely void, the proceeding must be by *quo warranto*, not by *mandamus*" (*t*). It may be laid down, therefore, that in general *mandamus* is the proper proceeding to enforce an election or admission to a vacant office, *quo warranto* to try the title of a rival candidate who has been elected.

(*m*) *R. v. Corporation of Bridgewater*, 3 Doug. 379.

(*n*) *Corporation of Scarborough*, Str. 1180.

(*o*) *R. v. Newsham*, Say. R. 211, Borough of Carmarthen.

(*p*) *R. v. Bankes*, H. 4 Geo. III., 3 Burr. 1452, Borough of Corfe Castle; *R. v. Mayor of Colchester*, 2 T. R. 259; *R. v. Mayor, &c. of Oxford*, 6 A. & E. 349; *Hill v. R.*, 8 Moo. P. C. C. 139; *R. v. Birmingham*, 7 A. & E. 254; *R. v. St. Martin's in the Fields*, 17 Q. B. 149; 20 L. J., Q. B. 423, S. C.

(*q*) As where the person elected mayor was at the time a captain of foot on a voyage to America with his regiment, and likely to continue abroad for six years. *R. v. Corporation of Cambridge*, Newland's MS. 4to. 109. "We may safely say that *quo warranto* is the proper proceeding, except where the disputed election is merely colourable, so as to be no

election at all." *Per Lord Campbell*, C. J., in *Frost v. Mayor of Chester*, 5 E. & B. 538.

(*r*) *R. v. Mayor of Bossiney*, alias *Tintagel*, H. 8 Geo. II., MS.; Str. 1003; Bull. N. P. 201, cited in *R. v. Bankes*, 3 Burr. 1454; case of *Aberystwith*, Trin. 14 Geo. II., Str. 1157; *Corporation of Scarborough*, Hil. 16 Geo. II., Str. 1180; *R. v. Newsham*, Borough of Carmarthen, E. 28 Geo. II., Say. 211; *R. v. Mayor of Cambridge*, H. 7 Geo. III., 4 Burr. 2008; *R. v. Mayor of Leeds*, 11 A. & E. 512; 4 P. & D. 632.

(*s*) *Re Barlow*, 30 L. J., Q. B. 271.

(*t*) *Per Coleridge*, J., in *Frost v. Mayor of Chester*, 5 E. & B. 538; *R. v. Councilors of Derby*, 7 A. & E. 419; *R. v. Mayor of Winchester*, *ibid.* 215; *R. v. Phippen*, *ibid.* 966; and see *R. v. St. Martin's in the Fields*, 17 Q. B. 149; 20 L. J., Q. B. 423.

An election completed after the departure of the presiding officer, who forms an integral part in the elective assembly, is void (*u*). An assembly was regularly convened for the purpose of nominating and electing a new mayor, over which the then mayor presided. He declared that the persons with whom the nomination rested were equally divided, and consequently that no election could be made; and thereupon he directed proclamation to be made for dissolving the assembly. No objection was made to this, nor did any persons give notice that they meant to proceed to make an election. But when the mayor was gone away, and a number of the burgesses also departed, considering the assembly as dissolved, the rest proceeded to make an election. It was held, that this election could not be supported: for assuming it to be clear (though the point has never been judicially decided), that an election begun by one presiding officer, could be completed under another, yet this was not a continuation of the business begun before the mayor, but an attempt to continue that which had been concluded. Considering, also, the case upon the statute, and that if the mayor absent himself, the next in place and order present may preside: yet here the mayor did not absent himself, but did preside, and as presiding officer determined upon the validity of the votes, that they were equal, and that no election could be had, and then dissolved the assembly; and all this without any objection made at the time; and in consequence of such dissolution of the assembly, unobjected to, as it appeared, many of the freemen went away, and then the rest of them made the election in question: this was not an election within the aid of the statute, which never meant to protect elections made by surprise and fraud (*v*). Words of permission, when tending to promote the public benefit, are always held to be compulsory; hence, where the words of the charter were, that the mayor and jurats "*might have power*" to hold a court of record for the recovery of debts, a mandamus was granted to compel them to hold it; although it appeared that no such court had been held for above thirty years (*x*).

Where an election is directed by Act of Parliament to be conducted by the chairman of a board, assisted by others, it will, if it take place in his absence, be absolutely void, even although it be not suggested that the result would have been different had he been present (*y*).

(*u*) *R. v. Buller*, 8 East, 389.

(*v*) *R. v. Gaborian*, 11 East, 77.

(*x*) *R. v. The Mayor and Jurats of Hastings*, B. R. Hil. 2 & 3 Geo. IV., 5 B. & A. 692, n. See also *R. v. Steward, &c., of Havering Atte-Bower*, 5 B. & A. 691. See however the decisions on the liability of railway companies to make or complete their line and branches, *York and North Midland Railway v. R.*,

1 E. & B. 858 (reversing the decision in *S. C.* 1 E. & B. 178); *Great Western Railway v. R.*, *ibid.* 874; *R. v. Lancashire and Yorkshire Railway*, *ibid.* 228, 873; *R. v. Eastern Counties Railway*, 10 A. & E. 531; *Cohen v. Wilkinson*, 12 Beav. 125, 138; 1 Mac. & G. 481; *per Lord Campbell*, C. J., 16 Q. B. 28.

(*y*) *Reg. v. Backhouse*, 12 L. J., Q. B. 579.

Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had turned the election, a mandamus to order a fresh election was refused; though the persons whose votes had been rejected were parties to the application (z).

III. *In what other Cases the Court will grant a Mandamus.*

The circumstance of the office being subject to the Ecclesiastical Court, affords no objection. Hence, writs of mandamus have been granted to admit or restore prebendaries (a), an apparitor-general (b), parish clerks (c), and sextons (d). So to admit scavengers (e), &c.; to restore a schoolmaster of a grammar-school founded by the crown (f); so to restore a member of an university who had been improperly suspended from his degrees (g). In like manner a mandamus will lie to compel a dean and chapter to fill up a vacancy among canons residentiary (h); so to the Ecclesiastical Court to swear churchwardens elected by the parish (i); so to grant the probate of a will to an executor (j).

A mandamus lies to a lord of a hundred to hold a leet to appoint constables and other officers (k). So to the judge of the Prerogative Court of Canterbury to grant administration to the husband of the wife's estate when the husband has done nothing to depart from his right (l). In the case of *R. v. Windham* (m), the court granted a mandamus to compel the warden of Wadham College to affix the common seal of the college to an answer of the fellows, &c., in chancery, although the warden disapproved of the answer of the fellows, and had put in a separate answer. So to the master of a corporation to affix the common seal to the presentation of a person duly named to a living by the majority at a corporate meeting (n); but where an advowson is vested in feoffees in trust, on

(z) *Exp. Mawbey*, 3 E. & B. 718. See *R. v. Birmingham*, 7 A. & E. 254; and see *post*, tit. "Quo Warranto."

(a) *R. v. Dean of Norwich*, 2 Str. 159.

(b) *Folke's case*, cited *per Cur.*, in *R. v. Ward*, Str. 897.

(c) *R. v. Ashton*, Say. R. 159; *R. v. Warren*, Cowp. 371.

(d) *R. v. Churchwardens of King's Clere*, 2 Lev. 18; 1 Vent. 143, *S. C.* Note. It appeared, by the certificate of the minister and several parishioners, that the sexton was an officer for life, and received two-pence from every house, yearly, as wages. But in the same term it was granted for another sexton without such certificate.

(e) Said *per Cur.*, in *Ile's case*, 1 Vent.

143, to have been granted. See also 2 T. R. 181.

(f) *R. v. Bailiffs of Morpeth*, Str. 58.

(g) *R. v. University of Cambridge*, T.

19 Geo. III., *Dr. Etlin's case*.

(h) *Bishop of Chichester v. Harward*, 1 T. R. 652.

(i) *Anon.*, 1 Vent. 115.

(j) 1 Vent. 335.

(k) *R. v. Lord of the Hundred of Milverton*, 3 A. & E. 284.

(l) *R. v. Bettesworth*, Str. 857, 1118.

(m) Cowp. 377.

(n) *R. v. Kendall*, 1 Q. B. 366, 4 P. & D. 603; but see *R. v. Bland*, Burn's Ecc. Law, 117, and the case in the next note.

avoidance, to present such person as should be elected by the majority of the landowners in a parish, a mandamus does not lie, because the remedy of the landowners is in equity, or perhaps by *quare impedit*, and the clerk elected has no legal right (*o*). So to a gaoler to deliver up to the executor the body of a prisoner, who died in custody on civil process, to be buried (*p*). So a mandamus lies to compel a bishop to grant inspection of his register of presentations and institutions to a living within his diocese to a person claiming the right of patronage, although the bishop himself claimed that right, for such register is of a public nature (*q*). So to admit a clerk of trustees under the General Turnpike Act (*r*). So to summon a jury under the Lands Clauses Consolidation Act (*s*). It is no objection to a rule for a mandamus that it relates to a charity of private institution (*t*).

A mandamus will lie to J. P. to nominate overseers of the poor, although the time mentioned in the stat. 43 Eliz. has expired; because the statutes for the relief of the poor are to be construed liberally (*u*). So to appoint a surveyor of the highways (*v*), where the J. P. had not appointed at the time mentioned in the 13 Geo. III. c. 78, s. 1 (*x*). So to sign and allow a poor's rate; and in this case they will grant the mandamus in the first instance, and not a rule to show cause, for otherwise the poor might starve (*y*). And this remains unaltered by the provisions of the Poor Law Amendment Act (*z*). So to enforce a poor's rate by warrant of distress (*a*); and in a case of this kind the writ was granted, notwithstanding a suggestion that the warrant would be executed within Hampton Court Palace: the officers of the Crown threatened proceedings, and the court, having on a previous occasion decided that the property was rateable, refused to call on the parish to give an indemnity (*b*). So a mandamus lies to overseers to make a rate (*c*), but not an equal rate (*d*). A mandamus lies to justices to hear and adjudicate in a removal case, but not to make the order of removal itself in any particular case (*e*), because the

(*o*) *R. v. Orton (Trustees)*, 14 Q. B. 139; and see *R. v. Abrahams*, 4 Q. B. 157.

(*p*) *R. v. Fox*, 2 Q. B. 246.

(*q*) *R. v. The Bishop of Ely*, 8 B. & C. 112.

(*r*) *R. v. Trustees of Cheshunt Turnpike*, 5 B. & Ad. 438; but see *R. v. Guardians of Dolgelly Union*, 8 A. & E. 561.

(*s*) *R. v. Birmingham, &c. Railway*, 15 Q. B. 634; *Re South Yorkshire Railway*, 14 Jur. 1093.

(*t*) *R. v. Abrahams*, 4 Q. B. 157.

(*u*) *R. v. Sparrow*, Str. 1123.

(*v*) *R. v. Justices of Denbighshire*, 4 East, 142.

(*x*) Repealed by 5 & 6 Will. IV. c. 50.

(*y*) *R. v. Fisher*, Say. R. 160; *R. v.*

Lord Godolphin, 1 D. & L. 830.

(*z*) *R. v. Earl of Yarborough*, 12 A. & E. 416; 3 P. & D. 491.

(*a*) *R. v. Ellis*, 2 D. N. S. 361; *R. v. Benn*, 6 T. R. 198; *St. Luke's v. Justices of Middlesex*, 1 Wils. 133; *R. v. Check*, 11 Jur. 86, n.

(*b*) *R. v. Justices of Middlesex*, 2 D. N. S. 385; but see *R. v. Hall*, 1 Har. & W. 83; *R. v. Mirehouse*, 2 A. & E. 632; and *R. v. Barker*, 6 A. & E. 391.

(*c*) *R. v. Gadsby*, 1 N. & P. 572; *R. v. Edlaston*, 1 N. & P. 20.

(*d*) *R. v. Barnstaple*, 1 Barn. 137; *R. v. Canterbury*, 4 Burr. 2290.

(*e*) *R. v. Justices of Radnor*, 2 D. N. S. 673; *R. v. Justices of Middlesex*, 4 B. & Ald. 298, *post*, p. 1031.

court interferes only where the inferior tribunal declines to exercise its jurisdiction, not where it exercises it erroneously (*f*). The rule that, if an inferior court abstains from entering upon the merits, in consequence of arriving at a wrong decision upon a preliminary point, the court of Q. B. will set such court right, has been held to apply to the county courts as well as to other inferior courts (*g*). But by 19 & 20 Vict. c. 108, ss. 43, 44, the remedy by mandamus against any judge or officer of a county court, for refusing to do any act relating to his office, is taken away (*h*). And by 11 & 12 Vict. c. 44, s. 5, the court may, in lieu of a mandamus, grant a rule ordering justices to do an act (*i*). The court has a discretion as to whether a mandamus should be granted to justices to issue a warrant of commitment after conviction (*k*). The court will not in general grant a mandamus to justices in sessions to do that which may occasion costs for which they have no means of reimbursing themselves (*l*). And the court refused a mandamus to a J. P. to issue a distress for a rate where there was a probability that an action would be brought against him for doing it (*m*), there being a legal doubt as to the validity of the rate.

An accused person found guilty by a jury at a session irregularly held, is entitled to have the record of the proceedings correctly made up according to the fact, and a mandamus will be granted to the justices to make up such record (*n*).

A mandamus lies to the justices of the peace of a county or borough, to permit an individual on behalf of several persons who contribute to the county rate, to inspect and take copies of the last two rates made by the justices, and all orders for the expenditure thereof, and other proceedings relating thereto. But an application for such inspection must be previously made to the justices assembled at quarter sessions (*o*). A party applying for a mandamus to compel churchwardens to allow him to inspect their accounts, according to the directions of the 17 Geo. II. c. 38, must state some special reasons for which he wishes to see the accounts (*p*), which reasons must be of a public nature (*q*). The

(*f*) *R. v. Blanshard*, 13 Q. B. 218; *R. v. Leicester*, 15 Q. B. 674; *R. v. Justices of Worcestershire*, 3 E. & B. 477. See also *R. v. Mainwaring*, 27 L. J., M. C. 278; *R. v. Bridgman*, 2 New Sess. Cas. 232; *Exp. Davy*, 2 D. N. S. 24; *R. v. Morgan*, 2 A. & E. 618; *R. v. West Riding*, 1 New Sess. Cas. 247.

(*g*) *R. v. Richards*, 20 L. J., Q. B. 352; and see *Exp. Milner*, 15 Jur. 1037.

(*h*) See *Furber v. Sturmey*, 3 H. & N. 521; *Whitehead v. Procter*, *ibid.* 532.

(*i*) See *R. v. Dayman*, 7 E. & B. 676; *R. v. Ingham*, 17 Q. B. 884; *R. v.*

Browne, 13 Q. B. 654.

(*k*) *In re Williams*, 9 Q. B. 976.

(*l*) *In re Lodge*, 2 A. & E. 123; 4 Nev. & M. 312, S. C.

(*m*) *R. v. Greame*, 2 A. & E. 615. See also *R. v. The Justices of Bucks*, 3 Nev. & M. 68; *R. v. Mirrhouse*, 2 A. & E. 632; and *post*, p. 1031.

(*n*) *R. v. The Justices of Middlesex*, 5 B. & Ad. 1113.

(*o*) *R. v. JJ. of Leicester*, 4 B. & C. 891.

(*p*) *R. v. Clear*, 4 B. & C. 899.

(*q*) *Ex parte Briggs*, 1 E. & E. 881.

court will not grant a mandamus for the inspection of documents by members of a corporate body, unless it be shown that there is some specific ground for the application (*r*).

Although it was formerly doubted whether a mandamus would lie to a lord of a manor to admit a copyholder; yet in *R. v. Rennett* (*s*), where application was made for a mandamus to the steward of a manor to admit a person who claimed as heir-at-law to a customary estate within the manor, the court said, they had no doubt but that a mandamus ought to be granted, to compel a lord of a manor to admit a copyholder, if a proper case were laid before them; and it has been held, that the fact of the copyholder claiming by descent is no objection; for although he had as complete a title without admittance as with it, against all the world but the lord, yet he has a right to insist on admittance to make him a complete copyholder (*t*). See also *R. v. Lord of the Manor of Hendon* (*u*), where a mandamus was granted to the lord, who had refused to admit the surrenderee of a copyhold estate on account of a disagreement respecting the fine to be paid; the court observing, that they would not give an opinion respecting the lord's fine on an application by a tenant for a mandamus to be admitted, because the lord had not any right to the fine until admittance. See also *R. v. Coggan* (*v*), where a mandamus was granted to the lord and steward of a manor to admit a person to a copyhold tenement, who had a *primâ facie* legal title, in order to enable him to try his right, though a court of equity had before refused to compel the lord to admit him for want of his showing an equitable right to the property; Lord *Ellenborough*, C. J., observing that he was aware that the power of the Court of King's Bench to grant a mandamus to admit to a copyhold had been questioned on the other side of the Hall, yet the court having, for many years past, been in the constant habit of granting such writs, upon a sufficient *primâ facie* title made out on the part of the person applying, he could not doubt their power in this respect. *Note.* There being a claim of a previous fine due to the lord in respect of the ancestor from whom the party claimed, the rule for a mandamus was granted, upon the party's undertaking to pay such fine or fines as should be due to the lord. The court will not grant a mandamus to admit *cestui que trust*, although he has a clear equity, the legal estate appearing on the court-rolls to be in the trustees. A mandamus to admit will not issue to the steward of a manor belonging to the crown (*x*). No instance is to be found of the court granting

(*r*) *R. v. Merchant Taylors' Company*, 2 B. & Ad. 115.

(*s*) 2 T. R. 197.

(*t*) *R. v. The Brewers' Company*, 3 B. & C. 172, recognized by *Bayley*, J., in *R. v. Wilson*, 10 B. & C. 87; and see *R.*

v. Lord of the Manor of Bonsall, 3 B. & C. 173; *R. v. Evans*, 1 Q. B. 355.

(*u*) 2 T. R. 484; and see *R. v. Lord Wellesley*, 2 E. & B. 924.

(*v*) 6 East, 431.

(*x*) *R. v. Powell*, 1 Q. B. 352. See

a mandamus to the lord to *license* under any circumstances (*y*). It makes no difference by what mode the party becomes entitled to the franchise, whether by charter, prescription, or tenure; therefore, where, by the custom of the borough of Midhurst the jury at a court baron is to present the alienation of every burgage tenement, and upon such presentment the steward is to admit the tenant, who then becomes entitled to the franchises of the borough, the jury, at a court baron in 1749, having refused to present several conveyances of burgage tenements, the court granted a mandamus to the lord to hold a court, and to the burgesses to attend at such court, and to present the conveyances (*z*). And though one mandamus will not lie to restore several persons, yet the court held it would lie in this case to the jury to do an act to perfect the rights of several. So where, by the custom, the court-leet was to present to the steward the person whom the commonalty of the borough had chosen to be mayor, the court granted a mandamus to the steward to hold a court-leet, and to the in-burgesses to attend at such court, and to present J. D., who had been chosen by the commonalty (*a*). And it is the same where no particular person is interested; as where by charter or prescription the corporate body ought to consist of a definite number, and they neglect to fill up the vacancies as they happen, the court will grant a mandamus (*b*). Where a defendant is ousted on *quo warranto*, the prosecutor is entitled to the writ of mandamus for a new election, if he applies in a reasonable time (*c*); if not, the defendant (*d*).

In cases of actions or suits commenced here, for which cause hath arisen in India, the king's courts at Westminster may award writs of mandamus to the C. J., and judges of the supreme court of judicature, or judges of the mayor's court at Madras, Bombay or Bencoolen, for the examination of witnesses. The plaintiff obtaining the verdict is entitled to the costs of cross-examining witnesses under a mandamus obtained by the defendant (*e*). But a mandamus will not be granted when the same end may be attained by the less expensive and less dilatory proceeding by commission (*f*).

In *R. v. The Lords of the Treasury* (*g*), the court granted a mandamus on the application of W. C. Smyth, to the lords commissioners to make and issue a Treasury minute or authority for

R. v. The Commissioners of Woods and Forests, 17 L. J., Q. B. 341.

(*y*) *R. v. Hale*, 9 A. & E. 342.

(*z*) *R. v. Midhurst*, 1 Wils. 283; 1 Bl. R. 60; Bull. N. P. 200, S. C., by the name of *R. v. Lord Montague*.

(*a*) *Borough of Christchurch*, 12 Geo. II., Bull. N. P. 200; S. C., cited in 1 Bl. R. 62.

(*b*) Case of the *Town of Nottingham*, 23 Geo. II., Bull. N. P. 201.

(*c*) *R. v. M'Kay*, 4 B. & C. 658.

(*d*) *R. v. Mears*, 4 B. & C. 659.

(*e*) *Whytt v. M'Intosh and others*, 8 B. & C. 317. See *R. v. Douglas*, 13 Q. B. 42; and 1 Arch. Pr. 313.

(*f*) *Farnworth v. Hyde*, 14 C. B. (N. S.) 719.

(*g*) 4 A. & E. 286; 5 Nev. & M. 589. See 4 A. & E. 976, 984; *Exp. Napier*, 18 Q. B. 692; *R. v. Commissioners of Woods and Forests*, 15 Q. B. 772.

the payment to S. of the arrears of a pension admitted to be held by them for his benefit; inasmuch as the claimant had a legal right and no other remedy, and as the writ was demanded not against the king, but against officers to whom the money had been paid for the claimant's use. So it seems that a mandamus will lie against the commissioners under a local act to levy a rate and pay the salary of officers whom the act authorizes them to appoint at a salary to be paid out of the rates to be raised thereunder, since *indebitatus assumpsit* will not lie against them (*h*). See also *R. v. The Lords of the Treasury* (*i*), where it was held, that if the annuity settled by act of parliament on the late queen dowager had been apportionable, the proper remedy for the non-payment of the portion of the broken quarter during which she died would have been by mandamus to the defendants to issue their warrant. But in *Re Lords of the Treasury, ex parte Walmsley* (*j*), the court held, that a mandamus would not lie to the Lords Commissioners of the Treasury, to compel them to pay a debt incurred by a county court, and that although parliament had upon an estimate made by the Commissioners of the Treasury voted a sum for the expenses of the county courts for the year. A mandamus to a chartered company, or to a company incorporated by act of parliament, as to place of shareholder's name on the register of shareholders will lie (*k*).

The court will grant a mandamus to a corporation requiring them to give a bond for the amount of compensation found to be due to an officer under the provisions of the 5 & 6 Will. IV. c. 76, s. 66 (*l*). Where the mayor and assessors refuse to revise the burgess lists, a mandamus lies to compel such revision, and the mandamus is properly directed to the existing mayor and assessors (*m*).

IV. Where not.

It is a general rule that a mandamus does not lie unless the party making the application has not any other specific legal

(*h*) *Bogg v. Pearse*, 10 C. B. 534; *R. v. The Norfolk Sewers*, 20 L. J., Q. B. 121. See *Addison v. Mayor of Preston*, 12 C. B. 108; and *Moffatt v. Dickson*, 13 C. B. 543.

(*i*) 16 Q. B. 357. See *R. v. Commissioners of Excise*, 14 L. J., Q. B. 113; 9 Jur. 257; *R. v. The Commissioners of Woods and Forests*, 17 L. J., Q. B. 341; *R. v. Powell*, 1 Q. B. 352.

(*j*) 1 E. B. & S. 81.

(*k*) *Norris v. The Irish Land Com-*

pany, 8 E. & B. 512; 27 L. J., Q. B. 115; *R. v. Derbyshire Railway*, 3 E. & B. 784. See *Ex parte Nash*, 15 Q. B. 92.

(*l*) *R. v. Mayor, &c. of Carmarthen*, 11 A. & E. 9; 3 P. & D. 35; *Reg. v. Swansea*, 11 A. & E. 66; 3 P. & D. 16; *Reg. v. Mayor, &c. of Norwich*, 3 Q. B. 285; 2 G. & D. 605; *R. v. Brighton*, 7 E. & B. 249.

(*m*) *The Mayor, &c. of Rochester, v. Reg.*, E. B. & E. 1024, in error.

remedy (*n*). On this ground the court refused to grant a mandamus to a bishop, to license a curate of a curacy, which had been twice augmented by Queen Anne's bounty, where the right of appointing was claimed by two several parties, and there had been cross nominations; because the party had another specific remedy by *quare impedit* (*o*). So a mandamus does not lie to the governor and company of the Bank of England to transfer stock, because the party has his remedy by assumpsit (*p*). The court will not interpose where the subject is purely of ecclesiastical jurisdiction. Hence, it will not grant a mandamus to churchwardens to make a church rate (*q*), nor to parishioners to meet and choose an organist (*r*). But it will put in motion their functions in *ordine ad.*; *i. e.*, to assemble in order to inquire and agree, whether it be fit that a rate should be made (*s*). The court will not compel the enrolment in an inferior court of an instrument which in its terms would give power to commit unlawful acts (*t*).

Although the court will grant a mandamus in order to enforce the making a poor's rate, they will not grant it with a direction, that certain persons shall be inserted in the rate; although an affidavit be made of the sufficiency of such persons, and that the omission had for its object the preventing their having votes for members of parliament (*u*). The power of licensing public-houses being absolutely in the discretion of the justices of the peace, the court will not award a mandamus for the licensing of a public-house (*v*). Nor will it issue one commanding justices at quarter sessions to send up to the grand jury a bill of indictment for libel, they having exercised their discretion, and postponed it to the assizes (*x*). A mandamus will not lie to compel admission to the degree of barrister; the only mode of relief is by appeal to the judges (*y*). Nor to compel the benchers of an inn of court to admit an individual as a member of the society, with a view to his qualifying himself to be called to the bar (*z*). Nor to the principal and ancients of Barnard's Inn to admit an attorney into the society (*a*). Nor for a fellow of a college (*b*), nor in the case of a

(*n*) *Per Buller, J.*, in *R. v. Bishop of Chester*, 1 T. R. 404; in *R. v. Mayor of Stafford*, 3 T. R. 652; *R. v. The Bristol Dock Company*, M. 52 Geo. III., S. P. See also 2 Doug. 526; and *R. v. Orton (Trustees)*, 14 Q. B. 139, *ante*, p. 1016.

(*o*) *R. v. Bishop of Chester*, 1 T. R. 396; *R. v. Chapter of Exeter*, 12 A. & E. 512.

(*p*) *R. v. Bank of England*, 2 Doug. 524.

(*q*) *R. v. Churchwardens of St. Peter's, Thetford*, 5 T. R. 364.

(*r*) *Exp. Le Cren*, 2 D. & L. 571.

(*s*) *R. v. Churchwardens and Overseers of St. John and St. Margaret, West-*

minster, 4 M. & S. 250.

(*t*) *R. v. Conyers*, 8 Q. B. 999.

(*u*) *R. v. Weobly*, Str. 1259. See *ante*, p. 1024.

(*v*) *Giles's case*, Str. 881, *per Ryder, C. J.*; *R. v. Nottingham*, Say. R. 217.

(*x*) *Re Armstrong*, 14 Irish C. L. R. 97; 9 Cox, Crim. Cases, 342.

(*y*) *R. v. Gray's Inn*, Doug. 353.

(*z*) *R. v. The Benchers of Lincoln's Inn*, Wooller's case, 4 B. & C. 855.

(*a*) *R. v. P. and A. of Barnard's Inn*, 5 A. & E. 17.

(*b*) *R. v. Dr. Whaley, Master of Peterhouse College, Cambridge*, E. 12 Geo. II. 34 MS. Serjt. Hill, p. 325.

member of any eleemosynary foundation when there is a visitor (*c*). Although wherever there appears to be a general visitor, the common law courts will not interpose; yet as this is in the nature of a plea to the jurisdiction, it must appear on the return. The court will not supersede the writ of mandamus on an affidavit of the fact; it must appear by matter of record, which the party may contest (*d*). A mandamus would not lie to the judge of the Ecclesiastical Court to grant a probate of a will *pendente lite* (*e*). Nor will it lie to the master and wardens of the company of gun-makers, to cause them to give a proof-mark to a freeman of their company; because they are no legal establishment (*f*). Nor to the mayor and aldermen of London to admit a person to the office of auditor of the chamberlain's and bridgemaster's accounts, who has served it three years successively; because contrary to the custom of the city (*g*). Nor to compel the repair of a turnpike road (*h*). Nor to compel the construction or completion of a railway under the ordinary form of special act (*i*). Nor to the College of Physicians, commanding them to examine a doctor of physic, who has been licensed, in order to his being admitted a fellow of the college (*j*). Nor to a visitor where he is clearly acting under a visitatorial authority (*k*). For the court will compel a visitor to exercise his visitatorial power, but will not review his decision (*l*). A mandamus to reinstate a person in an office only lies where the office and its tenure are of a permanent nature, thus it is not an available remedy for the secretary of a benefit society (*m*). A mandamus lies to restore the minister of an endowed dissenting chapel, although the foundation is private (*n*). But in *R. v. Jotham* (*o*), the court refused a mandamus to restore a minister of an endowed dissenting meeting-house; because it did not appear, that he had complied with the requisites necessary to give him a *prima facie* title; adding, that a mandamus to *admit* was granted merely to enable the party to try his right; but the court had always looked much more strictly to the right of the party applying for a mandamus to be *restored*; and moreover if he had been before regularly admitted, he might try his right by action for money had and received. A mandamus did not lie to the Archbishop of Canterbury to issue his fiat to the proper officer for the

(*c*) *R. v. Dean of Chester*, 15 Q. B. 517; *R. v. Dean of Rochester*, 17 Q. B. 1.

(*d*) See note (*b*), *supra*.

(*e*) 1 Bl. R. 668.

(*f*) 2 Lord Raym. 989.

(*g*) 1 T. R. 423.

(*h*) *Reg. v. Trustees of Oxford and Whitney Roads*, 4 P. & D. 154; 12 A. & E. 427; *R. v. Cheadle*, 7 Jur. 373; and see *R. v. Halifax (Trustees)*, 12 Q. B. 448.

(*i*) *York and North Midland Railway v. R.*, 1 E. & B. 858; *Great Western Railway v. R.*, *ibid.* 874. See *R. v. The Bristol Dock Company*, 2 Q. B. 64, and

see *ante*, p. 1022. It is no objection however to an application for such mandamus that it is made by a shareholder, *R. v. Ambergate, &c. Railway*, 17 Q. B. 362.

(*j*) *R. v. College of Physicians*, 7 T. R. 282.

(*k*) *Adm. R. v. Bishop of Ely*, 2 T. R. 345.

(*l*) *Exp. Buller*, 1 Jur., N. S. 709.

(*m*) *Evans v. The Heart of Oak Benefit Society*, 12 Jur., N. S. 163, Q. B.

(*n*) *Per Lord Denman, C. J.*, in *R. v. Abrahams*, 4 Q. B. 160.

(*o*) 3 T. R. 575.

admission of a doctor of civil law, a graduate of Cambridge, as an advocate of the Court of Arches (*p*). An authority was given by patent to registrars to exercise the office by themselves or by a sufficient deputy, to be appointed by the registrars, and allowed by the bishop. The registrars appointed a deputy, but the bishop disapproved of the appointment, stating that he had good and sufficient reasons for so doing, but did not allege any reasons. An application for a mandamus to the bishop to admit the party disapproved of was refused, the court being of opinion that as the bishop had the power of approving or disapproving, they could not call upon him to exercise his discretion in a particular manner (*q*). The court were equally divided as to whether a mandamus lies to the archbishop to confirm a bishop elect under 25 Hen. VIII. c. 20, s. 5 (*r*). The court will not grant a mandamus where the right is doubtful, and there is a remedy by withholding fees (*s*); nor where there is a remedy by an execution by *fi. fa.* (*t*), or by action (*u*). But it is no objection to the writ, that it only enjoins the doing that for omitting which a company are liable to an indictment (*v*). Indictment and not mandamus is the proper mode of enforcing obedience by a ministerial officer to an order of sessions (*x*), but this rule does not prevail where such officer is put forward merely as a nominal party, and there are other persons who are those really to be compelled to perform the duty (*y*). A mandamus is granted only for public persons, and to compel the performance of public duties. Hence, the court will not grant it to a trading corporation at the instance of one of its members, to compel them to produce their accounts, for the purpose of declaring a dividend of the profits (*z*). The mode of burying the dead is a matter of ecclesiastical cognizance; and therefore, where the question was, whether a parishioner had a right to be buried in a churchyard in an iron coffin, which was a new and unusual mode, the court refused a mandamus (*a*). So the court refused a mandamus to a rector to bury a corpse in a vault, or in any particular part of the churchyard, he having a right to exercise a discretion on the subject (*b*). The court will not grant a mandamus to com-

(*p*) *R. v. Archbishop of Canterbury*, 8 East, 213.

(*q*) *R. v. Bishop of Gloucester*, 2 B. & Ad. 158.

(*r*) *R. v. Archbishop of Canterbury*, 11 Q. B. 483.

(*s*) *R. v. Stoke Damerd*, 5 A. & E. 584.

(*t*) *R. v. Victoria Park Company*, 1 Q. B. 288; 4 P. & D. 639; and see *R. v. Hull and Selby Railway*, 13 L. J., N. S. 257, Q. B.

(*u*) *R. v. Ponsford*, 1 D. & L. 116; *R. v. Bank of England*, 2 Doug. 524; and see *R. v. Conyers*, 8 Q. B. 981.

(*v*) *R. v. Bristol Dock Company*, 2 Q.

B. 64; 1 G. & D. 286.

(*x*) *R. v. Bristow*, 6 T. R. 168; *R. v. Jeyes*, 3 A. & E. 416; *R. v. Treasurer of Surrey*, 1 Chitty, 650. See also *R. v. Oswestry*, 12 Q. B. 242; *R. v. Clark*, 5 Q. B. 887.

(*y*) *R. v. Wood Ditton*, 18 L. J., M. C. 218; *Exp. Bottom*, 13 Jur. 680.

(*z*) *R. v. The Governor and Company of the Bank of England*, 2 B. & A. 620. See also *R. v. London Ass. Comp.*, 5 B. & A. 899.

(*a*) *R. v. Coleridge*, 2 B. & A. 806.

(*b*) *Exp. Blackmore*, 1 B. & Ad. 122; and see *R. v. South Eastern Railway*, 17 Jur. 901.

pel overseers of a parish to bury the body of a pauper lying in the parish, but not in a parochial house (c). The court have no power to grant a mandamus to justices to compel them to come to a particular decision, as, to make an order of maintenance on a particular parish (d). Although the court will not grant a mandamus which will expose justices to danger, yet it will put them in motion in a case where they clearly ought to proceed (e). Where the certiorari is taken away, the court will not indirectly bring proceedings under review by a mandamus (f). The court has no authority to grant a mandamus to compel a registrar to erase an erroneous registry of birth under 6 & 7 Will. IV. c. 86 (g). A mandamus will not be granted to command a railway company to *take the seal off* the register of shareholders on a suggestion that it was affixed contrary to the provisions of the Companies Clauses Consolidation Act; for the court grant the writ when that has not been done which ought to have been done, but not for the purpose of undoing what has been done (h). Where the office of clerk to the guardians of a union is full, the remedy to try the validity of the election is, as in other cases, by *quo warranto*, not mandamus (i).

V. Of *Mandamus under the Common Law Procedure Act.*

The remedy by mandamus is extended by the Common Law Procedure Act, 1854, which provides, that the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that he intends to claim a writ of mandamus, and may, thereupon, claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested (j). The declaration in such action must set forth sufficient grounds upon which such claim is founded, must set forth that the plaintiff is personally interested therein, that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected (k). The action for mandamus, like the writ, does not lie where there is any other

(c) *R. v. Stewart*, 12 A. & E. 773; 4 P. & D. 349.

(d) *R. v. Justices of Middlesex*, 4 B. & A. 298; *R. v. Justices of Radnor*, 2 D. N. S. 673. See *R. v. Bennett*, 2 B. & Ad. 712, and *ante*, p. 1024.

(e) *R. v. Barker*, 6 A. & E. 388; but see *ante*, p. 1025.

(f) *R. v. Justices of the West Riding of Yorkshire*, 1 A. & E. 563; 3 Nev. &

M. 802.

(g) *Exp. Stamford*, 1 Q. B. 886; 1 G. & D. 428.

(h) *Exp. Nash*, 15 Q. B. 92.

(i) *R. v. St. Martin's in the Fields*, 17 Q. B. 149; 20 L. J., Q. B. 423. See *ante*, p. 1021.

(j) 17 & 18 Vict. c. 125, s. 68.

(k) *Ibid.* s. 69.

remedy (*l*). The pleadings and other proceedings in any action in which a writ of mandamus is claimed are the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages (*m*).

In case judgment is given that a mandamus do issue, the court, if it shall see fit, besides issuing execution in the ordinary way for costs and damages, may also issue a peremptory mandamus to the defendant, commanding him forthwith to perform the duty to be enforced (*n*). The writ need not recite the declaration or other proceedings, or the matter therein stated, but must simply command the performance of the duty, and in other respects is to be in the form of an ordinary writ of execution, except that it is to be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge either with or without terms (*o*). The writ of mandamus so issued shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment (*p*). The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done should be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution (*q*). These provisions are not to affect the jurisdiction of the Court of Queen's Bench to grant writs of mandamus; nor will any writ of mandamus issued out of that court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under them (*r*). These enactments do not extend to the enforcement of a duty arising out of a mere personal contract: their object, it has been laid down by Lord *Campbell*, is merely to facilitate the mode of proceeding in cases in which, before the act, a writ of mandamus would have lain (*s*). His lordship, however, in a subsequent case, was not prepared to say that that is the exact limit (*t*); and a mandamus,

(*l*) *Bush v. Bearan*, 32 L. J., Ex. 52; 1 H. & C. 500.

(*m*) *Ibid.* s. 70.

(*n*) *Ibid.* s. 71; and see R. G., Mich. 1854.

(*o*) 17 & 18 Vict. c. 125, s. 72.

(*p*) *Ibid.* s. 73.

(*q*) *Ibid.* s. 74; and see R. G., Mich. 1854.

(*r*) 17 & 18 Vict. c. 125, s. 75.

(*s*) *Benson v. Paul*, 6 E. & B. 273; 25 L. J., Q. B. 274, S. C.

(*t*) *Norris v. Irish Land Company*, 8 E. & B. 512; 27 L. J., Q. B. 119.

to place the plaintiff's name on the register of shareholders in a chartered company, was granted (*u*).

VI. *Form of the Writ.*

Having endeavoured in the foregoing sections to explain the nature of a mandamus, and having briefly stated those cases in which this remedy may be adopted, I shall proceed to consider the form of the writ; as to which the following rules may be useful (*v*) :—

1. The provisions of the Common Law Procedure Acts, 1852 and 1854, so far as they are applicable, apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Court of Queen's Bench (*x*).

2. Care must be taken that the mandamus is properly directed, that is, to the persons who are to obey the writ (*y*). And this duty is cast upon the person who applies for the writ; for the court, when they grant the writ, will not specify the person to whom it is to be directed (*z*). If the writ be improperly directed, *e. g.*, if the right of election be in the mayor and aldermen, and the mandamus is directed to the mayor, aldermen, and *common council*, the court will grant a supersedeas, *quia improvide emanavit* (*a*). If a writ be directed to a corporation by a wrong name, they may return the special matter, and rely upon it; but if they answer the exigency of the writ, they admit themselves to be the corporation to whom the writ is directed; and cannot take advantage of the misnomer (*b*).

3. The writ must contain convenient certainty, in setting forth the duty to be performed; but it need not particularly set forth by what authority the duty exists. Therefore where a mandamus to the commissary of the Archbishop of York to admit a deputy register, stated *quod minus rite recusavit* to admit, it was held sufficient; though it was objected, it was the constant form to allege that the party to whom the writ is directed, is the person to whom it appertains to swear and admit; for if the defendant was not the person to whom the executing this writ belonged, he should have returned

(*u*) See *ante*, pp. 1029, 1032.

(*v*) As to what steps are necessary before application to the Court of Queen's Bench, for a mandamus to proceed to the election of any corporate officer of a borough, see 6 & 7 Vict. c. 89, s. 5, *post*, tit. "Quo Warranto."

(*x*) 17 & 18 Vict. c. 125, s. 77.

(*y*) *R. v. Mayor of Hereford*, Salk. 701; *R. v. Mayor of Ripon*, Salk. 433. If the writ is directed to the corporation,

it has been held good. But if it be directed to those, who, by the constitution of the corporation, ought to do the act, without doubt it is good also. *Per Holt, C. J.*, *R. v. Mayor of Abingdon*, Ld. Raym. 560.

(*z*) *R. v. Wigan*, 2 Burr. 782.

(*a*) *R. v. Mayor of Norwich*, Str. 55.

(*b*) *R. v. Bailiffs of Ipswich*, Salk. 434, 435. See 17 & 18 Vict. c. 125, s. 77.

so, but instead of that, the return consisted merely of matter of excuse; besides it was laid that *minus rite* he refused, which was an averment that in justice *he ought* to do it (*c*). So a mandamus to the Dean of the Arches to grant probate to Lord Londonderry's executors, setting out that the dean *juxta juris exigentiam recusavit*, was held sufficient, though it was objected that it did not show the dean's title to grant probate; not having set out that there were *bona notabilia* within the province; for the court will not presume an inferior jurisdiction, and it appeared that he had already done some acts of office as the prerogative judge, and he shall not be received now to say it does not appear he has any jurisdiction (*d*). Where the duty is to do either one of two things, a mandamus commanding the performance of one of them is bad, unless it shows on the face of it circumstances which establish the impossibility of exercising this option by performing the other (*e*). The ground of the application for a mandamus is, that there is no other remedy. Where, therefore, a mandamus directed to a corporation, and commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied, it was held bad (*f*).

4. If several persons have been removed, there must be a distinct writ for each person; for they cannot join; for the interest is several, and the amotion of one is not the amotion of the others (*g*). And a writ of mandamus which is bad as to one of the matters commanded, is bad *in toto*, and a peremptory mandamus cannot be awarded (*h*).

5. Every circumstance that is requisite to show that the party is entitled to be admitted, must be suggested in the writ (*i*), and a defect cannot be supplied by the return (*j*); therefore, where in a mandamus to the ordinary to license a curate, it was stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate of the church of P., but neither the consent of the rector nor any endowment or custom for the inhabitants to make such nomination and appointment was stated, the court quashed the writ (*k*). But although it is essential such facts should be alleged as are necessary to show that the party applying

(*c*) *R. v. Ward*, Str. 897.

(*d*) *R. v. Bettesworth*, Str. 857.

(*e*) *R. v. South Eastern Railway*, 4 H. L. Cas. 471; 17 Jur. 931.

(*f*) *R. v. Margate Pier Company*, 3 B. & A. 220. Q. Whether in such a case a mandamus will lie? *S. C.*

(*g*) *R. v. City of Chester*, 5 Mod. 11; the case of *Andover*, Salk. 433; *Anon.*, Salk. 436.

(*h*) *R. v. Tithe Commissioners*, 19 L.

J., Q. B. 177; *R. v. St. Pancras*, 3 A. & E. 535; 5 N. & M. 219; *R. v. Caledonian Railway*, 16 Q. B. 19; *R. v. London and South Western Railway*, 12 Q. B. 775. But it is otherwise as to a return. *R. v. Mayor of New Windsor*, 7 Q. B. 908.

(*i*) 6 Mod. 310, *per Holt*, C. J.

(*j*) *R. v. Hopkins*, 1 Q. B. 161; 4 P. & D. 550.

(*k*) *R. v. Bishop of Oxford*, 7 East, 345.

for the writ is entitled to the relief prayed, no precise form is required (*l*).

6. The writ must be granted to proceed to an election to the office, and not to elect a particular person (*m*).

7. The writ must be tested; and there must formerly have been fourteen days between the teste and the return, if it went above forty miles, otherwise only eight days, and one day to be taken inclusive, the other exclusive (*n*), and if there be not, it would be superseded though in the first instance granted absolutely; as to pay money out of the poor-rates (*o*). But now, upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in all cases be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it by the court or a judge, either with or without terms (*p*).

Upon discovering any informality in the writ, the party may apply to amend at any time before the return (*q*), but after the return has been made and traversed, the court would not, before the Common Law Procedure Act, 1854 (*r*), permit an amendment in the mandamus (*s*). A motion cannot be made to supersede the writ after the return is out (*t*). Although it has been said that the defendant will not be permitted to avail himself of any objection to the writ after the return (*u*); yet it has since been adjudged that an exception may be taken to the writ even after the return, and at any time before a peremptory mandamus issues (*v*). Where the court grants a rule to show cause, though upon showing cause it appear doubtful, whether the party have a right or not, yet the court will issue a mandamus, in order that the right may be tried upon the return (*x*). But the court will not grant a mandamus to a person to exercise a jurisdiction, when it is doubtful whether he has the power to exercise it or not (*y*). Upon a motion for a mandamus to the warden of the Vintners' Company to swear J. S. one of the court of assistants, the affidavit being only that he was informed by some of the court of assistants, that he was elected, and there being no positive affidavit of an election, the court would

(*l*) *Per Lee, C. J.*, in *R. v. Mayor and Burgesses of Nottingham*, Say. R. 37.

(*m*) 2 Bulst. 122; 2 Roll. Abr. 456, pl. 5.

(*n*) *R. v. Mayor of Dover*, Str. 407.

See *R. v. Conyers*, 8 Q. B. 981.

(*o*) *R. v. St. Andrew's, Holborn*, 7 A. & E. 281.

(*p*) 17 & 18 Vict. c. 125, s. 76.

(*q*) 6 Mod. 133, *per Holt, C. J.*

(*r*) *Ante*, p. 1034.

(*s*) *R. v. Mayor of Stafford*, 4 T. R. 690.

(*t*) Said *per Lee, J.*, in *Whitwood, q. t. v. Jocam*, B. R. M. 7 Geo. II. MS., to have been so determined in Lord Raymond's time.

(*u*) *Per Kenyon, C. J.*, and *Buller, J.*, in *R. v. Mayor of York*, 5 T. R. 74, 75.

(*v*) *R. v. Margate Pier Company*, 3 B. & A. 220; *Clarke v. Leicestershire, &c. Canal Company*, 6 Q. B. 898; *Green v. Pope*, 1 Ld. Raym. 125.

(*x*) *R. v. Dr. Bland*, Bull. N. P. 200.

(*y*) *R. v. Bishop of Ely*, 1 Wils. 266.

only grant a rule to show cause, but said, if there had been a positive affidavit of his election, they would have granted the writ in the first instance (*z*).

The omission in the writ of a necessary fact cannot be cured by the return (*a*).

8. The costs of issuing the writ under the Common Law Procedure Act of 1854, are, unless otherwise ordered by the court or a judge, to be included in the writ (*b*).

VII. *Of the Return.*

The next object of consideration is the return.

1. The return must be made by the person to whom the writ is directed.

2. It must be positive and certain (*c*). Before the Common Law Procedure Act, 1854 (*d*), the same certainty was required in a return to a mandamus as in indictments or returns to writs of *habeas corpus* (*e*). But if the return was certain on the face of it, that was sufficient, and the court could not intend facts inconsistent with it for the purpose of making it bad (*f*). The return must not have been augmentative (*g*). To a mandamus to elect, it is a good return, that a person has been duly elected, and sworn into the office (*h*). To a mandamus to a commissary to admit A. B. into the office of churchwarden, reciting that he had been duly elected, a return that A. B. was not duly elected is good (*i*).

3. Where the mandamus is to *restore* a person who has been removed from an office, the return must be very accurate in stating, first, the power of the corporation to remove (*j*); secondly, the return must set forth a sufficient and reasonable cause of removal. There are three kinds of offences for which a corporator may be removed (*k*).

First,—For any offence committed against his duty as a corporator: in this case the corporator is removable without any

(*z*) Bull. N. P. 200.

(*a*) *Mayor of London v. R.*, 13 Q. B. 1; *R. v. South Eastern Railway*, 17 Jur. 901.

(*b*) C. L. P. Act, 1860, s. 32.

(*c*) 11 Rep. 99, b. See also *R. v. Marquis of Abingdon*, Salk. 432. See as to demurrers to the return, 6 & 7 Vict. c. 67, s. 1, *post*, p. 1045.

(*d*) *Ante*, p. 1034.

(*e*) *Per Buller, J.*, Doug. 158.

(*f*) Doug. 159.

(*g*) *R. v. Lyme Regis*, Doug. 158; *R. v. Mayor of London*, 13 Q. B. 1.

(*h*) *R. v. Williams*, Say. R. 140.

(*i*) *R. v. Williams*, 8 B. & C. 681; *R. v. The Mayor of New Windsor*, 7 Q. B. 917.

(*j*) *R. v. Mayor, &c. of Doncaster*, Trin., 25 & 26 Geo. II., 34 MS. Serjt. Hill, p. 210.

(*k*) *R. v. Mayor of Derby*, 9 Geo. II., Bull. N. P. 206; *R. v. Richardson*, 1 Burr. 538; *R. v. Liverpool*, 2 Burr. 732.

previous conviction by a jury (*l*). The power of trial, as well as amotion, for an offence of this kind, is incident to *every* corporation (*m*).

Secondly,—For an offence which is in itself of so infamous a nature as to render the offender unfit to execute any public franchise, *e. g.*, forgery, perjury, &c., although such offence has not any immediate relation to his office. An offence of this kind ought to be established by a previous conviction by a jury, according to the law of the land (*n*). It is the infamy which renders the corporator an improper person to be continued in an office of trust; therefore, if the crime for which he is convicted be such as does not carry such infamy with it, it will be no cause of disfranchisement; as if he were convicted of a simple assault (*o*).

Thirdly,—For any offence of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law. Where the offence is criminal in both respects, the difference seems to be, that if it consists of one single fact, as burning the charters of the corporation, bribery, &c., there must be a conviction; but not where it may be considered as abstracted, the one from the other, as riot and assault upon any other member, so as to obstruct the business of the corporation (*p*). Misemploying the corporation money is not a sufficient cause of disfranchisement, because the corporation may have their action for it (*q*).

Although the return be insufficient, yet if it appear to the court, that the party has no ground for being restored, the court will not restore him (*r*).

The due execution of the power of removal must be set forth in the return. In a return to a mandamus to a corporation to restore a member who has been removed, it should appear that the body removing had proved the charge for which the member was removed. It is not sufficient to state merely, that he was present when the charge was made, and did not deny it (*s*).

It is not a good return to state, that the party was incapable of being elected; for the proper way of trying whether he was capable of being elected, is by an information in nature of *quo warranto* (*t*). So, where all the proceedings of the election were set forth in the writ, concluding, "by reason whereof A. was elected," a return stating A. was not elected, was held to be bad, for the defendant ought to have traversed some of the acts alleged (*u*). Where, upon

(*l*) Bull. N. P. 206, cites *R. v. Derby*, 9 Geo. II., which case was first brought before the court in E. T. 8 Geo. II. See Session Cases, vol. ii. p. 343.

(*m*) See Lord Mansfield's opinion, 1 Burr. 538.

(*n*) *Per* Lord Mansfield, C. J., in *R. v. Richardson*, 1 Burr. 539.

(*o*) Bull. N. P. 206, cites *R. v. Derby*,

9 Geo. II.

(*p*) *Ibid.*

(*q*) *R. v. Chalke*, Lord Raym. 226.

(*r*) *Per Cur.*, in *R. v. Tidderly*, 1 Siderf. 14.

(*s*) *R. v. Faversham*, 8 T. R. 352.

(*t*) *R. v. Doncaster*, Say. R. 40; but see *ante*, p. 1018.

(*u*) *R. v. Mayor of York*, 5 T. R. 66.

a mandamus commanding defendant to take upon himself the office of common councilman of the borough of Leicester, the return was, that by a bye-law, persons refusing to fill the office were subject to a certain fine, and that defendant had paid the fine; it was held, that the return was insufficient, as it did not state that the fine was to be in lieu of service (*x*).

4. The rule is, not to presume everything against the return, but not to presume anything either one way or the other (*y*).

5. The return must not contain two inconsistent causes (*z*), otherwise the court will quash the whole return (*a*). But several consistent causes may be returned: and where the causes are not inconsistent, although some are bad, yet the court may admit the good and reject the bad (*b*). It is not necessary that every part of the return should be good; the court will not quash it, if on the whole it state a sufficient reason to justify the party making it (*c*). Masters of grammar schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion; and it is a good return to a mandamus to the ordinary to grant such a licence, that the party applying refused to be examined as to his sufficiency in learning (*d*). To a mandamus to restore J. S. to the office of sexton, the defendant returned, that J. S. was not duly elected according to the ancient custom of the parish; and further, there was a custom for the inhabitants in vestry to remove the sexton from his office, and that J. S. was removed pursuant to such custom: it was held, that there was not any repugnancy in saying, that J. S. was not *duly* elected; but that, being in *fact* elected, they had, according to an ancient custom, removed him. In either case, they were equally entitled to exercise that right. The return, therefore, was allowed (*e*). The return need not be under the seal of the corporation, nor need it be signed by the mayor: for the return of a mandamus is matter of record, and acts done by a corporation upon record, are not required to be under hand or seal; for in such case an action lies against a body politic, or the persons who procure the false return (*f*). Where a return of a mandamus to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for amotion, the court will not award a peremptory mandamus; the only effect of which would be to compel the corporation to restore an officer whom they would be bound imme-

(*x*) *R. v. S. Bower, the younger*, 1 B. 908.
& C. 585.

(*y*) *R. v. Lyme Regis*, Doug. 158.

(*z*) See 2 T. R. 456.

(*a*) *Adm. R. v. Mayor of Cambridge*,
2 T. R. 456. See also *R. v. Mayor of*
York, 5 T. R. 66.

(*b*) *Wright v. Fawcett*, 4 Burr. 2041;
R. v. Mayor of New Windsor, 7 Q. B.

(*c*) *R. v. Archbishop of York*, 6 T. R.
490.

(*d*) *S. C.*

(*e*) *R. v. Taunton St. James*, Cowp.
413.

(*f*) *R. v. Mayor of Exeter*, Lord Raym.
223. See also *R. v. Chalice*, Lord Raym.
848, S. P.

diately to remove in a more formal manner (g). Clerical mistakes in the return may be amended, even after it is filed (h). The prosecutor of a mandamus to which a return has been made, having moved for a concilium, (and the court, having, upon argument, adjudged that the return is sufficient in law), cannot afterwards traverse the facts contained in the return (i).

6. A return to a mandamus traversing matter of law is bad (k). And so also is a return which applies only to matter stated in the writ, as a consequence of the neglect of duty imputed, and does not answer the mandatory part of the writ (l).

7. A return is not allowed to a peremptory writ of mandamus (m).

VIII. *Of the Remedy, where the Party to whom the Writ of Mandamus is directed does not make any return, or where he makes an insufficient or false return.*

The first writ of mandamus always concludes with commanding obedience, or cause to be shown to the contrary (n); but if a return be made to it, which upon the face of it is insufficient, the court will grant a peremptory mandamus; and if that be not obeyed, an attachment will issue against the persons disobeying it. So if the return consists of several distinct matters, and issue is joined on the only one of them which constitutes a valid return, on a verdict being found for the Crown, a peremptory mandamus will issue, notwithstanding that the prosecutor has left the other insufficient matters unanswered (o). If no return be made, the court will grant an attachment against the persons to whom the mandamus was directed; with this difference, however, that where a mandamus is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus; but where it is directed to several persons in their natural capacity, the attachment for disobedience must issue against all, though, when they are before the court, the punishment will be proportioned to their offence (p).

But by C. L. P. Act, 1860, s. 33, "writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof *as in the case of a mandamus*, or

(g) *R. v. Griffiths*, 5 B. & A. 731.

(h) *R. v. Lyme Regis*, Doug. 157.

(i) *R. on Prosecution of M. Scales v. Mayor and Aldermen of London*, 3 B. & Ad. 255; *R. v. North Midland Railway*, 4 B. & Ad. 955. See *R. v. Payn*, 11 A. & E. 955; 3 P. & D. 623; *R. v. Oundle*, 1 A. & E. 283; 3 Nev. & M. 484; and *R. v. Eastern Counties Railway*, 10 A. & E. 531; 2 P. & D. 648.

(k) *R. v. Bristol Docks Company*, 2 Q.

B. 64; *R. v. Lyme Regis*, Doug. 159.

(l) *Ibid.*

(m) *R. v. Ledgard*, 1 Q. B. 616; *R. v. Hudson*, 9 Jur. 345.

(n) Bull. N. P. 201.

(o) *R. v. Luton Roads*, 1 Q. B. 860.

(p) *R. v. Overseers of St. Chad's, Salop*, H. 8 Geo. II., MS., Bull. N. P. 201. An objection may be taken to the writ, on showing cause against the attachment. *R. v. Ledgard*, 1 Q. B. 616.

by writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery." Attachment, being a personal remedy, did not lie against a corporation aggregate (*q*). Whether this section operates to give a remedy for enforcing writs of mandamus against a corporation by attachment against the directors personally, does not seem clear.

If the return upon the face of it be good, but the matter of it false, an action upon the case lies for the party injured against the persons making such false return. And where the return is made by several, the action may be either joint or several, it being founded upon a tort: but if it appear upon evidence that the defendant voted against the return, but was overruled by a majority, the plaintiff will be nonsuited (*r*); and though the return be made in the name of the corporation, yet an action will lie against the particular persons who caused the return to be made (*s*); or if the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information against the persons making the return (*t*). The return must be filed and allowed before the information can be moved for. A mandamus was directed to the mayor, bailiff, and burgesses of A. The mayor made a return; a motion was made to stay the filing of it, upon a suggestion that the return was made against the votes of the majority, who would have obeyed the writ. But the court resolved, that they could not refuse the mayor's return, because he was the principal officer to whom the writ was directed and actually delivered; and, as he had returned and brought in the writ, it was not fit that the court should examine upon affidavits whether the majority consented. But if the mayor had made any return contrary to the votes of the majority it was at his peril, and the way to punish him was by information (*u*).

Note.—Where several join in an application for a mandamus, they may all join in the action for a false return (*v*). And if in such action or information the return be falsified, the court will grant a peremptory mandamus; however, it cannot be moved for until four days after the return of the postea, because the defendants have that time to move in arrest of judgment (*x*); and the court will not award a peremptory mandamus until the proceed-

(*q*) *Mackenzie v. Sligo Railway Co.*, 9 C. B. 250.

(*r*) Carth. 172.

(*s*) *Per Holt*, C. J., Lord Raym. 564.

(*t*) *Surgeons' Comp.*, Salk. 374; *R. v. Mayor of Nottingham*, H. 25 Geo. II.,

Bull. N. P. 203, *S. P.*

(*u*) *R. v. Mayor of Abingdon*, Salk. 431; Carth. 499.

(*v*) *Green v. Pope*, Lord Raym. 125.

(*x*) *Per Holt*, C. J., *Buckly v. Palmer*, Salk. 430, 431.

ings on the original mandamus are complete (*y*). In an action for a false return, the plaintiff set out, that he was chosen upon the 1st of October, according to the custom. Upon evidence, it appeared that the custom was to choose on the 29th of September, and that the plaintiff was then chosen; and this was held sufficient to support the declaration, for the day in the declaration is but form (*z*). If the mayor of a corporation procure a false return to be made, it will be sufficient evidence against him that the mandamus was delivered to him, and that the mandamus has such a return made; and that will be presumptive evidence against him that he made that return unless he shows the contrary, for the mayor or any other member of the corporation, or others, who shall procure a false return to be made, are liable in their private capacity (*a*). In an action brought in C. B. for a false return, the plaintiff obtained judgment; the court of K. B. refused to grant a peremptory mandamus: *Holt*, C. J., observing, that every mandamus recites the fact *prout patet nobis per recordum*, and that they could not take notice of the records of the Common Pleas (*b*). Yet where, in an action for a false return, judgment was given for the defendant, and, upon a writ of error, judgment was reversed in the Exchequer Chamber, the Court of K. B. granted a peremptory mandamus before judgment entered, saying, it was a mandatory writ, and not a judicial writ founded upon the record (*c*).

Before the stat. 9 Ann. c. 20 (*d*), except in extraordinary cases (*e*), an attachment did not issue for want of a return until after the return of an *alias* and *pluries* writ of mandamus, and disobedience of a peremptory rule to return (*f*). But by that statute, reciting that persons who had a right to the office of mayors, or other offices within cities, towns corporate, boroughs, and places, or to be burgesses or freemen thereof, had either been illegally turned out, or had been refused to be admitted thereto, and had no other remedy to procure themselves to be admitted or restored than by writs of mandamus, the proceedings on which were very dilatory and expensive; it was enacted,

1. That a return should be made to the first writ of mandamus (*g*).

2. That the persons prosecuting such writ might plead to, or traverse, all or any the material facts contained in the return, to which the persons making such return should reply, take issue, or demur; and such further proceedings should be had therein, as might have been had if the persons suing such writ had brought

(*y*) *Reg. v. Baldwin*, 8 A. & E. 947; 3 P. & D. 124.

(*z*) *Vaughan v. Lewis*, Carth. 228.

(*a*) *Per Cur.*, *R. v. Challice*, Lord Raym. 848.

(*b*) *Anon.*, Salk. 428, probably the *S. C.* as is reported by the name of *Green v. Pope*, 1 Lord Raym. 128, where *S. P.* is

said to have been ruled.

(*c*) Bull. N. P. 202.

(*d*) Repealed as to so much as prevents the re-election of mayors and other annual returning-officers, by stat. 3 & 4 Vict. c. 47.

(*e*) See Skinn. 669.

(*f*) Bull. N. P. 203.

(*g*) Sect. 1.

their action on the case for a false return ; and in case a verdict should be found, or judgment given for them upon a demurrer, or by *nihil dicit*, or for want of a replication or other pleading, they should recover damages and costs, and a peremptory writ of mandamus should be granted without delay for them for whom judgment shall be given, as might have been if such return had been adjudged insufficient ; and in case judgment shall be given for the persons making such return, they shall recover costs (*h*).

3. That the statute for the amendment of the law, (4 Ann. c. 16,) and all the statutes of jeofail should be extended to writs of mandamus, and the proceedings thereupon (*i*).

The power of traversing the return, which is given by the second section of the preceding statute, is given in the room of an action for a false return ; and as in such action it cannot be said that the damages are collateral, so neither can it be said that they are collateral in a proceeding under the statute, for they are consequent or dependent upon the issue, and the jury are to inquire of the damages as parcel of the charge ; and, consequently, if, in a proceeding under the statute, the jury omit to find damages and costs for the plaintiff, whether the verdict be general or special, this defect cannot be supplied by a writ of inquiry (*k*) : but in such case the party may bring an action for a false return ; for the act does not take away the party's right to bring such action, but only provides, that in case damages are recovered by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action for making such return (*l*). Where issue was joined upon the traverse of the return, and the prosecutor did not proceed to trial according to the practice of the court, judgment as in case of a nonsuit might, before the Common Law Procedure Act, 1854 (*m*), have been given (*n*).

Since the preceding statute, a mandamus, in cases to which the statute applies, is in the nature of an action, pleadings therein being admitted, and in such cases, before 6 & 7 Vict. c. 67, a writ of error lay upon the judgment (*o*) ; but upon the award of a peremptory mandamus, in a case to which the statute of Anne does not apply, a writ of error was held not to lie (*p*). It appears from the wording of the statute, that there are many cases to which it does not extend ; therefore in all those cases the proceedings must have been according to the course of the common

(*h*) Sect. 2. A traverse of an immaterial allegation will, of course, be bad. *R. v. Dendy*, 1 E. & B. 829.

(*i*) Sect. 7.

(*k*) *Kynaston v. Mayor of Shrewsbury*, T. 9 & 10 Geo. II., MS., and Str. 1052, S. C.

(*l*) Bull. N. P. 203. See Str. 1053.

(*m*) See *ante*, p. 1036, and 15 & 16

Vict. c. 76, s. 100.

(*n*) *Wigan v. Holmes*, Say. R. 110 ; *R. v. Mayor of Stafford*, 4 T. R. 689.

(*o*) 1 P. Wms. 351 ; Str. 1052 ; *R. v. Manchester and Leeds Railway*, 3 Q. B. 528 ; 1 G. & D. 338.

(*p*) *Dean of Dublin v. The King* (in error), D. P., 21st April, 1724, 1 Bro. P. C. 73, Tomlins' edit.

law (q). But by 1 Will. IV. c. 21, [30th March, 1831,] s. 3, after reciting that the provisions contained in the 9th Ann. c. 20, had been found useful and convenient, and that the same ought to be extended to the proceedings on other such writs, it is enacted, that the several enactments, contained in the said statute, relating to the return to writs of mandamus and the proceedings on such returns, and to the recovery of damages and costs, shall be and are extended and made applicable to all other writs of mandamus and the proceedings thereon, except so far only as the same may be altered by this act (r). These alterations are as follow :—The 4th section, reciting, that writs of mandamus, other than such as relate to the offices and franchises provided for by the 9th of Anne, are sometimes issued to officers and other persons, commanding them to admit to offices, or to perform other matters, in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters, and that it may be proper such officers and persons should, in certain cases, be protected against the payment of damages or costs, to which they might otherwise become liable, enacts that the court, if it shall see fit, may make rules and orders, calling not only on the person to whom such writ may be required to issue, but also every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of costs of the application ; and upon the appearance of such other person, or in default after service, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given or mentioned by or in any act passed during this session, for giving relief against adverse claims made upon persons having no interest in the subject of such claims (s) : provided, that the return and issues in fact or in law shall be made and joined in the name of the person to whom the writ is directed ; but the court may direct the same to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense (t) ; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person on whose behalf the return shall be expressed to be made, and who shall have the like remedy for recovery of costs and enforcing judgment, as the person to whom the writ shall have been directed might and would otherwise have had. The proceedings are, by

(q) Bull. N. P. 204.

(r) An order to plead several matters may be made under this section. *R. v. Ambergate Railway*, 17 Q. B. 957. Admissions contained in any particular plea are to be taken for the purposes of that plea only. *R. v. Smith*, 5 Q. B. 614.

(s) See the provisions of 1 & 2 Will. IV. c. 58.

(t) It is in the discretion of the court whether they will exercise this power. *R. v. Cheek*, 9 Q. B. 942 ; *Paynter v. R.*, 10 Q. B. 908 ; 14 L. J., M. C. 182.

the 5th section, not to abate by the death, resignation, or removal from office, of the person making the return under the authority of this act and a peremptory writ may be directed to the successor. The 6th section is general, and enacts, that in all cases of application for any writ of mandamus, the costs of such application, whether the writ be granted or refused, and also the costs of the writ, issued and obeyed, shall be in the discretion of the court, who are to order by whom, and to whom, the same shall be paid (*u*). The rule acted on by the court under this section is, that, where an application for a mandamus is made and opposed, the unsuccessful party pays costs, except under very peculiar circumstances (*x*). In a case where the proceedings had commenced before this act came into force, the court refused the application for costs (*y*). Under this statute, the costs may be obtained by a distinct motion after the issuing of the writ (*z*).

The stats. 9 Ann. c. 20, and 1 W. IV. c. 21, gave no power to a prosecutor to demur to the return, so that the decision of the court as to the validity of the return might be reviewed by a writ of error; to remedy which the 6 & 7 Vict. c. 67 was passed, whereby it is enacted, that in all cases in which the person prosecuting any writ of mandamus shall wish or intend to object to the validity of any return already made or hereafter to be made to the same, he shall do so by way of demurrer to the same, in such manner as is now used in personal actions: and thereupon the writ and return and demurrer shall be entered upon record; and such further proceedings shall be thereupon had as upon a demurrer to pleadings in personal actions; and the court shall thereupon adjudge either that the return is valid in law, or that it is not valid in law; or that the writ of mandamus is not valid in law: and if they adjudge that the writ is valid in law, but that the return thereto is not valid in law, then and in every such case they shall also by their said judgment award that a peremptory mandamus shall issue in that behalf; and thereupon such peremptory writ of mandamus may be sued out and issued accordingly, at any time after four days from the signing of the said judgment: and it shall be lawful for the said courts respectively, and they are hereby required, in and by their said judgment to award costs to be paid to the party in whose favour they shall thereby decide by the other party or parties.

By sect. 2,—Whenever any such judgment as is hereinbefore mentioned shall be given, or whenever issue in fact or in law shall be joined upon any pleadings in pursuance of the said recited

(*u*) See *Reg. v. Fall*, 1 G. & D. 117; 1 Q. B. 636; *Reg. v. Kelk*, 1 G. & D. 127; 1 Q. B. 660; *Reg. v. Corporation of Newbury*, 1 Q. B. 751; 1 G. & D. 388; and see *Emery v. Corporation of Malmesbury*, 3 Q. B. 577; *R. v. Justices of*

Surrey, 9 Q. B. 37.

(*x*) *R. v. Justices of Surrey*, 14 Q. B. 684.

(*y*) *R. v. Wix*, 2 B. & Ad. 203.

(*z*) *R. v. Kirke*, 5 B. & Ad. 1089.

acts or either of them, and judgment shall be given thereon by any of the courts aforesaid, it shall be lawful for any party to the record in any of such cases who shall think himself aggrieved by such judgment to sue out and prosecute a writ of error, for the purpose of reversing the same, in such manner and to such court or courts as a party to any personal action in the said court may now sue out and prosecute a writ of error upon the judgment in such action; and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said courts respectively in personal actions: and if the judgment of such court be reversed by the said court of error, the said court of error shall thereupon by their judgment not only reverse the same, but shall also in addition thereto give the same judgment which the court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the same court of error; which shall be his authority and warrant for so doing: provided always, that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as hereinafter provided, shall be duly put in within four days after the allowance of the said writ of error; and the same shall afterwards be duly perfected according to the practice of the court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted.

And by sect. 3,—No action, suit or other proceeding shall be commenced or prosecuted against any person for anything done in obedience to any peremptory writ of mandamus issued by any court having authority to issue writs of mandamus. On motion for a mandamus to justices, however, the court will not, where they doubt whether the writ ought or ought not to be granted, direct it to issue merely in order that the justice may make a return, and obtain the protection of this section. And where a mandamus is directed to justices, they ought not to make a return merely to gain the protection of the statute, instead of obeying the writ (*a*).

(*a*) *R. v. Lord Dartmouth*, 5 Q. B. 878.

CHAPTER XXIX.

MASTER AND SERVANT.

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I. *Of Actions by Servants against their Masters for the Recovery of their Wages.*

If a person retain a servant, under an agreement to pay him so much by the day, month, or year, in consideration of the service to be performed, the servant, having fulfilled his part of the contract, may maintain an action against the master, or, in case of his death, against his personal representative, for a breach of the contract on the part of the master. The form of action will depend upon the nature of the contract: if the contract be by deed, an action of debt or covenant must be brought; if by parol, (*i. e.* in writing, but not a specialty, or verbal), an action of debt or assumpsit.

If a servant be hired in the general way, without mentioning the time, that is in general a hiring for a year; but this is not an inflexible rule of law, but must be considered in connection with the special circumstances of the case (*a*).

If a clerk or servant, engaged at a fixed salary, payable quarterly or yearly, resign his employment in the middle of a quarter, he is

(*a*) *Fawcett v. Cash*, 5 B. & Ad. 904; *Down v. Pinto*, 9 Ex. 327; 23 L. J., Ex. 103.
Baxter v. Nurse, 7 Scott, N. R. 801;

not upon that agreement entitled to a proportionate part of his salary. But where there has been no misconduct on either side, it may be left as a question for the jury whether the facts of the case raise a presumption that, at the time of the resignation, there was a new agreement that a payment for the broken quarter should be made (*c*). If the hiring be general, but the remuneration so much a month, an action accrues at the end of each month to recover the month's wages (*d*).

The plaintiff, commencing his service in March, 1793, served the defendant, an army agent, in the capacity of clerk, for several years, until December 23, 1826, at which time the defendant, without assigning any reason, dismissed the plaintiff, who was willing to have continued: it appeared that, in one year, the salary had been paid quarterly, but for the last six years before 1826 it was paid monthly; it was held, that there was an implied yearly hiring, and that defendant was bound to pay the salary up to the end of the year, and that a contract in writing was not necessary (*e*). Where the contract was to serve as reporter to a newspaper for one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties should respectively please; it was held, that this contract could only be terminated at the end of a current year (*f*). F. agreed with B. in the following terms:—"I agree to serve Major B. as steward, from May 31st, for 80*l.* per annum, &c., &c., three months' notice required on each side." F. was wrongfully dismissed from the employment by B., during a current year, without any previous notice. It was held, that the hiring was a yearly one, to be determined by either party by giving to the other three months' notice before the end of the current year, and that damages should be assessed on that principle (*g*). But if there be a recognized usage in any particular as to the duration of the hiring, or the amount of notice required to determine it, that usage will be taken as tacitly annexed to the contract between the parties, unless excluded by the terms (*h*); and whether such custom is excluded by the terms of the contract is a question of law for the court (*i*). A commission of bankruptcy does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk (*k*). If a partnership be dissolved and another formed, and a servant of the old

(*c*) *Lamburn v. Cruden*, 2 M. & Gr. 253; 2 Scott, N. R. 533. See *Huttman v. Boulnois*, 2 C. & P. 512; *Bayley v. Rimmett*, 1 M. & W. 506.

(*d*) *Taylor v. Laird*, 1 H. & N. 266; 25 L. J., Ex. 329.

(*e*) *Beeston v. Collyer*, 4 Bingh. 309.

(*f*) *Williams v. Bryne*, 7 A. & E. 177.

(*g*) *Forgan v. Burke*, 12 Ir. Com. Law R. 495.

(*h*) *Metzner v. Bolton*, 9 Ex. 518; 23 L. J., Ex. 130.

(*i*) *Parker v. Ibbetson*, 27 L. J., C. P. 236.

(*k*) *Thomas v. Williams*, 1 A. & E. 685.

partnership enters into an agreement to serve the new, this operates as an exoneration of any breach of contract between master and servant occasioned by the dissolution; for there cannot be two co-existent agreements by the same person to serve different firms composed of different persons, and the second agreement is thus an implied surrender of the first (*l*). In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages (*m*). A head gardener, is a domestic servant (*n*), so is a huntsman (*o*); not so a servant in husbandry (*p*), or a governess (*q*).

A master may discharge his servant at a moment's warning for misconduct (*r*), *e. g.* for being absent when wanted, sleeping from home at night without his master's leave (*s*); or, in the case of a mercantile clerk, for asserting that he is a partner in the business, &c. (*t*); or, for incompetence where the servant has represented himself as possessing the skill requisite for the performance of the work of art for which he was employed (*u*). If a domestic servant has not been guilty of misconduct, and the master discharges him without warning, the servant in that case will be entitled to a month's wages beyond the wages due for the period of actual service (*x*). But the action must be for an improper dismissal: the wages cannot be recovered under the common count for work and labour (*y*). Where a servant, under a general hiring at the rate of so much per annum, is dismissed for misconduct, he cannot recover any of the salary of the current year, even for the time during which he has served (*z*). Nor is it necessary that a master, having a good cause of dismissal, should either state it to the servant or act upon it; it is sufficient if the cause exist, and the servant is not entitled to object that it is not the cause for which he was dismissed (*a*). But it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then have been the cause of it (*b*). Where part of the contract of hiring was, that the plaintiff should use his best endeavours to promote the interests of the defendant, in an action brought for a wrongful dismissal, it was held to be a good defence, that the plaintiff did not use his best endeavours to promote the defendant's interest, and that therefore

(*l*) *Hobson v. Cowley*, 28 L. J., Ex. 205.

(*m*) *Per Littledale, J.*, *Farwell v. Cash*, 5 B. & Ad. 908.

(*n*) *Nowlan v. Ablett*, 2 Cr. M. & R. 54.

(*o*) *Nicoll v. Greaves*, 33 L. J. 259, C. P.; 17 C. B. (N. S.) 27.

(*p*) *Lilley v. Elwin*, 11 Q. B. 742; 17 L. J., Q. B. 132.

(*q*) *Todd v. Kerrick*, 8 Ex. 151; 22 L. J., Exch. 1.

(*r*) *Robinson v. Hindman*, 3 Esp. N. P. C. 235.

(*s*) *Turner v. Mason*, 14 M. & W. 112.

(*t*) *Amor v. Fearon*, 9 A. & E. 548.

(*u*) *Harmer v. Cornelius*, 28 L. J., C. P. 85. And see *Cuckson v. Stones*, 28 L. J., Q. B. 25.

(*x*) *Per Kenyon, C. J.*, in *Robinson v. Hindman*, 3 Esp. 235.

(*y*) *Fewings v. Tindal*, 1 Ex. 295.

(*z*) *Turner v. Robinson*, 5 B. & Ad. 789.

(*a*) *Ridgway v. Hungerford Market Company*, 3 A. & E. 171.

(*b*) *Cussons v. Skinner*, 11 M. & W. 161; and see *Spotswood v. Barrow*, 5 Exch. 110; 19 L. J., Ex. 226.

he dismissed him (c). Upon a yearly contract of hiring, the temporary inability of the servant to do work in consequence of illness, is no ground for the master's rescinding the contract, nor does it justify the master in refusing to pay the wages during the illness (d).

Where a person performed work for a committee, under a resolution entered into by them, "That any service to be rendered by him should, at a certain time, be taken into consideration; and such remuneration be made as should be deemed right;" it was held, that an action would not lie to recover a compensation for such work, the resolution importing that the committee were to judge whether any compensation was due (e). However, in a case where A. agreed to enter into the service of B., and wrote to him a letter as follows: "I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive I leave entirely to you." A. served B. in that capacity six weeks. It was held (*Parke, B., dissentiente*), that the contract implied that A. was to be paid something at all events for the services performed; and that the jury, in an action on a *quantum meruit*, might ascertain what B., acting *bond fide*, ought to have awarded (f). A. having performed gratuitously services for B., received from him a promissory note, with an understanding that he would accept it not only as a gift for what was passed, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued B.'s executors upon the note; it was held, that as there was no contract binding A. to perform future services, there was no consideration (g).

Where the declaration stated a contract for service for certain wages per annum, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof plaintiff lost all the wages, &c., he might have acquired from being continued in the service; it was held, that the plaintiff was only entitled to recover, as damages, wages for one month; and that the arrears of salary, due to him at the time of dismissal, could only be recovered in *indebitatus assumpsit* for work and labour (h). But a servant, under a quarterly hiring, improperly dismissed in the middle of a quarter, and who tendered himself but was not allowed to serve through the remaining part of the quarter, cannot recover wages for such part in an action of *indebitatus assumpsit* for work and labour commenced before the quarter ended (i). If the contract be the usual one for a year, determinable at a month's notice, a domestic servant, if improperly turned away, cannot recover wages for the month after

(c) *Arding v. Lomax*, 10 Ex. 734; 24 L. J., Ex. 80.

(d) *Cuckson v. Stones*, 28 L. J., Q. B. 25.

(e) *Taylor v. Brewer*, 1 M. & S. 290.

(f) *Bryant v. Flight*, 5 M. & W. 114.

(g) *Halse v. Halse*, 25 L. J., C. P. 177.

(h) *Hartley v. Harman*, 3 P. & D. 567; 11 A. & E. 798.

(i) *Smith v. Hayward*, 7 A. & E. 544; 2 Nev. & P. 432.

dismissal on a count stating the contract to be for an entire year; and he cannot recover on a common count for wages, for any further period than that during which he served (*k*). The plaintiff, a domestic servant, entered into the defendant's service on the 19th of November, and on the 15th of January her mistress caused her to be taken, on a charge of stealing, before a magistrate, who remanded her till the 20th, when she was discharged. On the 22nd the plaintiff went to demand her clothes and wages, including 1*l.* 1*s.* in lieu of a month's warning. The defendant tendered her 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea. It was held, that inasmuch as such placing the plaintiff in custody was no dissolution of the contract, the plaintiff was, under the circumstances, entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labour (*l*). But this last part of the decision is not in accordance with the later decisions. A clerk, whose salary was paid quarterly, having been dismissed in a broken quarter, brought an action for an improper dismissal, and recovered damages which did not include the services rendered by him during the broken quarter. He afterwards brought an action on the common counts for such services. It was held, that these could not be recovered in this form of action, as by bringing the first action he had treated the contract as still open, and could not afterwards treat it as rescinded, but that in the first action the jury ought to have been directed to take the fact of his actual service during the broken quarter into consideration in estimating the damages in the first action (*m*).

Where to an action for wrongfully discharging the plaintiff, the defendant pleads only payment of money into court, he cannot prove in mitigation of damages, that he discharged the plaintiff for misconduct; for evidence of such facts would be a bar to the right to recover, which was admitted by the plea (*n*).

The statutes 20 Geo. II. c. 19 (*o*), 6 Geo. III. c. 25, and 4 Geo. IV. c. 34, give powers to justices to determine complaints between masters and servants, and between masters, apprentices, artificers, and others (*p*).

II. *Of the Liability of the Master in respect of Contracts made by the Servant.*

A contract made by a servant, acting under the express authority of the master, is binding on the master (*q*). And the same rule

(*k*) *Fewings v. Tindal*, 1 Ex. 295.

(*l*) *Smith v. Kingsford*, 3 Scott, 279.

(*m*) *Goodman v. Pocock*, 15 Q. B. 576;
19 L. J., Q. B. 410.

(*n*) *Speck v. Phillips*, 5 M. & W. 279.

(*o*) Explained by stat. 5 & 6 Vict. c. 7.

(*p*) *Exp. Gordon*, 25 L. J., M. C. 12.

(*q*) F. N. B. 120, G.

holds, where the servant acts under an implied authority. The defendant, who was a dealer in iron, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time, with ready money, who received the goods, but did not pay for them. *Pratt, C. J.*, ruled, that the sending the waterman on trust the first time, and the defendant paying for the goods, was giving the waterman a credit so as to make the defendant liable upon the second contract (r). In an action by a publican, for beer sold, it appeared that the defendant had dealt with the plaintiff on credit, and paid him several sums for beer; at length the defendant gave notice to plaintiff's servant, who brought the beer, that he would pay for the beer as it came in. The defence to the present action was, that the defendant had paid the servant. Lord *Eldon, C. J.*, thought the defendant was liable; for, as the change in the usual mode of dealing had been suggested by the defendant himself, and as he had personal dealings with the master, in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must show that the master himself had notice of it, or he could have no defence to the action (s). In an action on a farrier's bill, it appeared that the defendant, by an agreement with the groom, allowed him five guineas a year, for which he was to keep the horses properly shod, and furnish them with proper medicines when necessary. Lord *Kenyon* said that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant (t).

But where an express authority is not given by the master, and from the nature of the case an authority cannot be implied, the master is not liable. Hence, where the chaise of the master had been broken by the negligence of his servant, and the servant desired a coachmaker, *who had never been employed by the master*, to repair it, which was accordingly done, and the master refusing to pay the amount of the bill sent in by the coachmaker, he insisted on retaining the chaise as a lien; Lord *Ellenborough, C. J.*, was of opinion, that the coachmaker was not entitled so to retain it; for whatever claim of that sort he might have, he must derive it from legitimate authority; that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which the master had not any knowledge, and to which he had not given any assent. It was the duty of the tradesman, when he was employed, to have

(r) *Hazard v. Treadwell*, Str. 506.

(t) *Precious v. Abel*, 1 Esp. N. P. C.

(s) *Gratland v. Freeman*, 3 Esp. N. P. 350.

inquired of the principal, whether the order was given by his authority; but having neglected to do so the master was not liable to the demand, and the detainer of the chaise was unlawful (*u*). The defendant had contracted to carry the goods of the plaintiff in a certain cart, but not the plaintiff herself; but she, with the consent of the defendant's servant, got into the cart and met with an injury by the cart breaking down, it was held that the defendant was not liable (*x*). When the master is in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesman delivers other goods of the same sort to the servant, upon credit, without informing the master of it, and the latter goods do not come to the master's use the master is not liable (*y*). A master contracted with a tradesman to serve him with articles for ready money, and the master gave his servant money to pay for the articles, which was done accordingly; after some time the master turned away his servant and took another, to whom he gave money as before; the second servant did not pay the tradesman and afterwards ran away: an action having been brought by the tradesman against the master; it was held, that the master was not liable to pay the money again (*z*).

"If a person keeping livery stables, and having a horse to sell, direct his servant not to warrant him, and the servant does nevertheless warrant him, still the master is liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant: but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment," *per Ashurst, J.* (*a*). The latter part of this statement, however, is not now, and does not seem ever to have been the rule of our law (*b*). Although the above passage has been often quoted in our text books, it is really a mere dictum of *Justice Ashurst*, in a case as to the authority of an agent to indorse a bill of exchange, and the *Lord Chief Justice Kenyon*, in his judgment, expressed an exactly contrary opinion. A horse-dealer's servant, sent to deliver a horse to a purchaser, was held not to have rendered his master liable by warranting the horse on delivery; for a warranty by a person entrusted merely to deliver

(*u*) *Hiscox v. Greenwood*, 4 Esp. N. P. C. 174. See *Maunder v. Conyers*, 2 Stark. N. P. C. 281.

(*x*) *Lygo v. Newbold*, 9 Ex. 302; 23 L. J., Ex. 108.

(*y*) *Pearce v. Rogers*, 3 Esp. N. P. C.

214. See also 1 Show. 95.

(*z*) *Stubbing v. Heintz*, Peake's N. P. C. 47.

(*a*) *Per Ashurst, J.*, in *Fenn v. Harrison*, 3 T. R. 760.

(*b*) See cases, *ante*, p. 572.

is not *primâ facie* binding on the principal, but an express authority must be shown (c).

An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere (d). It is not incident to the employment of a station-master or other servants of a railway company, that they should bind the company by contracts for surgical attendance on injured passengers. A company, therefore, is not liable for such attendance, without evidence of express authority to the servant to employ the surgeon (e). But this case is somewhat doubtful, and it has been since decided that at any rate, the *general* manager has implied authority in such a case (f).

III. *Of the Liability of the Master in respect of a tortious Act done by the Servant.*

The general rule is that a master is answerable for every such wrong of the servant as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved (g). Although the master has not authorised the particular act, he has put the servant in his place to do that class of acts, and he is answerable for the manner in which the servant conducts himself in doing them (h). Hence an action on the case will lie against a master for an injury done through the *negligence* or *unskillfulness* of the servant acting in his master's employ (i). As where the servants of a carman ran over a boy in the streets and maimed him, by negligence; an action was brought against the master, and the plaintiff recovered (k). So where the servant of A. with his cart, ran against the cart of B., which contained a pipe of wine, whereby the wine was spilled: an action was brought against A., the master, and held to be maintainable (l). An action on the case is the proper remedy for an injury of this kind, and not an action of trespass (m); and this

(c) *Woodin v. Burford*, 2 Cr. & M. 391, per Bayley, B.

(d) *Metcalfe v. Lumsden*, 1 C. & K. 309, per Rolfe, B.

(e) *Cox v. Midland Counties Railway*, 3 Ex. 268; 18 L. J., Ex. 65.

(f) *Walker v. The Great Western Railway*, L. R. 2, Ex. 228.

(g) *Laugher v. Poinier*, 5 B. & C. 554.

(h) *Barwick v. The English Joint Stock Bank*, L. R. 2, Ex. 266; but see in reference to corporations, *Addie v. The Western Bank of Scotland*, L. R. 1, Scotch App. Cas. 145, which, if the reasonings

of the judges in a Scotch case are to be taken as binding upon our courts, would seem to reverse the very sensible decision in *Barwick v. The English Joint Stock Bank*.

(i) A master may be rendered liable to proceedings of a criminal nature, by the acts of his servant. See, on this subject, *Attorney-General v. Riddell*, 2 Tyrw. 523; *R. v. Gutch*, 1 M. & Malk. 437; *R. v. Dixon*, 4 Campb. 12; *R. v. Almon*, 5 Burr. 2686.

(k) 1 Raym. 739.

(l) *Ibid.*

(m) *Morley v. Gaisford*, 2 H. Bl. 443.

is the rule in all cases where the master gives the control over a carriage or animal to a rational agent. Thus where a railway train going at the rate of forty miles an hour drove over some sheep which had strayed upon the line, in consequence of the defective state of the fences; it was held, that the railway company was not liable in trespass; but that the proper form of action was case, either for permitting the fences to be out of repair, or for directing the servant to drive at a speed so as to interfere with the right of the sheep to be on the line of railway (*n*).

To render the master responsible, the negligent act must be within the scope of the servant's employment. Hence, where the plaintiff allowed the defendant the use of a shed to make a signboard, and a servant of the latter, whilst making it, lighted his pipe, and, through carelessness, set fire to the shed, it was held that the master was not responsible (*o*).

Liability for negligence in the course of doing any lawful work, or, as it is sometimes called, collateral negligence, depends entirely upon the existence of the relation of master and servant, between the employer and the person actually in default (*p*). Where the owner of a barge paid two persons to navigate it, who were properly qualified within the stat. 7 & 8 Geo. IV. c. 75, (for regulating watermen and lightermen on the Thames,) and by their negligent management of the barge, within the limits of the act, another vessel was injured; it was held, that although the statute confined the owner to employing as his servants only individuals of a particular class, he still had the power of selection, though from a limited number, and that the persons hired were his servants, and that he was liable for the mischief, and that it made no difference whether the navigators were hired for the job or by time (*q*). But where a butcher employed a licensed drover to drive some bullocks from Smithfield market, and the drover employed a servant of his own for the purpose through whose negligence a bullock injured the plaintiff's property; it was held (*r*), that the butcher was not liable; for the drover was a person carrying on a distinct and independent business of his own, and it was no part of the butcher's business to drive the bullocks; he had only to select the licensed drover, who was the person that set in motion the servant whose negligent driving did the mischief (*s*). Generally, a sub-contractor is not deemed in law the servant of the party employing him, so as to render the latter liable for any action occasioned by his misconduct or negligence.

(*n*) *Sharrod v. London and North Western Railway*, 20 L. J., Ex. 185.

(*o*) *Williams v. Jones*, 33 L. J., Ex., 297; 3 H. & C. 602, in error.

(*p*) *Per Wilde, B., Hole v. The Sitting-bourne Railway*, 6 H. & N. 500; 30

L. J., Ex. 81.

(*q*) *Martin v. Temperley*, 4 Q. B. 298.

(*r*) *Milligan v. Wedge*, 12 A. & E. 737.

(*s*) *Per Lord Denman, C. J., in Martin v. Temperley*, 4 Q. B. 298

Therefore where the defendant, a builder, was employed to execute certain alterations in a house, including the preparation and fixing of gas fittings, and he made a sub-contract with B., a gas-fitter, to execute this part of the work; it was held that the plaintiff, who was injured by an explosion of gas, occasioned by B.'s negligence, could not recover damages from the defendant (*t*). But where the defendant employed a person skilled in the construction of drains, to cleanse a drain which ran from the defendant's grounds into the road, and paid him for the job; and an injury happened to the plaintiff in consequence of the negligent way in which the person so employed had left the soil of the road over the drain; it was held that the defendant was liable, the court being of opinion that the relation of master and servant existed between the defendant and the man who did the job (*u*). The real test in such a case is, it is said, whether the defendant has control over the person employed (*x*). Where a joint stock company contracted with A. for the laying of their main gas pipe in the streets of a town, having no powers for that purpose; and the servants of A. left a heap of stones in the street, over which the plaintiff fell, and injured himself; it was held that the company were liable, but this was upon the ground that the act contracted for could not be done without committing a public nuisance, and was therefore wrongful (*y*). See further on this point *infra*, tit. "Nuisance," p. 1084.

The defendant, a gentleman usually residing in the country, being in London for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent a pair, and a person to drive them. The defendant did not select the driver, nor had he any previous knowledge of him; but the stable-keeper sent such person as he chose for this purpose. The driver had no wages from his master, but depended on receiving a gratuity from the person whose carriage he drove; the defendant in this case gave him five shillings as a gratuity: by reason of his negligent driving, the plaintiff's horse sustained an injury; whereupon an action was brought. The Court of King's Bench were equally divided: *Abbott*, C. J., and *Littledale*, J., holding, that the defendant was not liable; *Bayley*, J., and *Holroyd*, J., contra (*z*). The opinion of the two former judges was adhered to in the following case:—The owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, and the owner of the horses provided a driver,

(*t*) *Rapson v. Cubitt*, 9 M. & W. 710. See also *Overton v. Freeman*, 11 C. B. 867; 21 L. J., C. P. 52; *Peachey v. Rowland*, 13 C. B. 182; 22 L. J., C. P. 81; *Gayford v. Nicholls*, 9 Ex. 70; 23 L. J., Ex. 205; *Steel v. South Eastern Railway*, 16 C. B. 550.

(*u*) *Sadler v. Henlock*, 4 E. & B. 570; 24 L. J., Q. B. 138.

(*x*) *Per Crompton*, J., in *Sadler v. Henlock*, 4 E. & B. 570.

(*y*) *Ellis v. Sheffield Gas Consumers' Company*, 2 E. & B. 767; 23 L. J., Q. B. 42.

(*z*) *Laugher v. Pointer*, 5 B. & C. 547. See remarks of Lord Abinger, C. B., in *Brady v. Giles*, 1 M. & Rob. 495, on this case.

through whose negligence an injury was done to a third party ; it was held, that the owners of the carriage were not liable to be sued for such injury ; and that it made no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses ; or that they had always paid him a fixed sum for each drive ; or that they had provided him with a livery, which he left at their house at the end of each drive ; and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house (a). The owner of a carriage hired four post horses and two postilions of A., a livery stable-keeper, for the day, to take him from London to Epsom and back : in returning, the postilions damaged the carriage of B. : it was held that A., as owner of the horses and master of the postilions was liable to B. for such damage (b). A party, consisting of the defendant, and others, hired a carriage and post-horses to go to Epsom and back ; the defendant rode upon the box with another of the party ; the postilions in endeavouring to force their way into a line of carriages overturned a gig, and injured the plaintiff, who was in it : a witness for the plaintiff swore that the defendant at the time and afterwards held himself out as responsible for the accident, and used expressions showing that he had a control over the postilions at the time it happened ; it was held, that he was liable in trespass (c). So trespass will lie against a corporation, a railway company for an assault committed by their servant, authorized by them to do the act (d). A warehouseman at Liverpool employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle to lower the barrel, and a master carter to remove it ; and through the negligence of the men the tackle failed, the barrel fell and injured the plaintiff, the master carter's man ; it was held, that the warehouseman was liable in case for the injury (e). But where some bales of cotton were insecurely piled in a warehouse by cotton porters acting under the control of the warehouse keeper, but in the employ of the defendant, a cotton merchant, to whom the bales belonged, and a few days afterwards the plaintiff being lawfully in the warehouse to re-canvas the bales of another cotton merchant, was injured by the fall of one of the defendant's bales, it was held that the defendant was not responsible (f). Where, however, the plaintiff, a servant of J. and Co., who when employed by the defendants to carry cotton from a ware-

(a) *Quarman v. Burnett*, 6 M. & W. 499.

(b) *Smith v. Lawrence*, 2 Man. & R. 1.

(c) *M'Laughlin v. Pryor*, 4 M. & Gr. 48 ; 4 Scott's N. R. 655.

(d) *Eastern Counties Railway v. Broom* (in error), 6 Exch. 314 ; 20 L. J., Ex. 196. As to what is not sufficient evidence of authority or ratification, see

the above case, and also *R. v. Birkenhead Railway*, 7 Ex. 36 ; 21 L. J., Ex. 9.

(e) *Randieson v. Murray*, 8 A. & E. 109. See also *Sadler v. Hencock*, 4 E. & B. 570, ante, p. 1056.

(f) *Murphy v. Caralli*, 3 H. & C. 462.

house was receiving the cotton into his lorry when in consequence of the negligence of the defendant's porters in lowering the bales from the upper floor of the warehouse a bale fell upon him and he was injured, it was held, that the plaintiff's and defendants' servants, not being under the same control, or forming part of the same establishment, were not so employed upon a common object as to deprive the plaintiff of a right of action against the defendants for such negligence (*g*). It seemed settled that there was no distinction between fraud and any other wrong, and that a master, whether an individual or a corporation, was answerable for the fraudulent act of his servant in the course of his business (*h*), but not for his wilful fraud, committed out of the scope of his authority or inconsistent with the course of his employment (*i*); but the judgments of LL. *Chelmsford* and *Cranworth* in a Scotch appeal case in the House of Lords seems to have again unsettled the law (*k*). Case for sinking plaintiff's vessel by a steam-boat, of which defendants were possessed and had the care, management, and direction, by their servants and mariners, through the mismanagement of the said servants and mariners. Plea, that the defendants had not the possession and care, &c., by their servants and mariners or otherwise. Defendants, being owners of the steam-vessel, chartered her to D., for six months, at 20*l.* per week, the owners to keep her in good and sufficient order for the conveyance of goods, &c., to and from Newcastle and Goole, or any other coasting station which D. might employ her in: D. to pay all disbursements, including harbour dues, pilotages, seamen's and captain's wages, and coals, oil, tallow, &c. for engines, and to insure the vessel; the policy to be deposited with the owners: it was held, that the issue ought to be found for plaintiff upon the interpretation of the charterparty alone (*l*). *A fortiori*, upon proof, in addition, that D. had no power to appoint or dismiss the officers and crew, and did not interfere in the arrangements of the ship. A. and B. were partners in the business of public carriers; by agreement between them, A. provided horses and drivers for certain stages, and B. for the remainder. It was held, that, notwithstanding this division of the concern between them, they were responsible for the misconduct and negligence of their drivers and servants throughout the whole distance. And that it was not any defence to B., that the servant through whose negligence an injury had been committed, had been hired and was paid by A. alone (*m*). The captain of a

(*g*) *Abraham v. Reynolds*, 5 H. & N. 147.

(*h*) *Hern v. Nicholls*, 1 Salk. 289; *Coleman v. Riches*, 16 C. B. 104; 24 L. J. 125, C. P.; *Udell v. Atherton*, 7 H. & N. 172; 30 L. J. 337, Ex.; *Barwick v. The English Joint Stock Bank*, L. R. 2, Ex. 259.

(*i*) *Coleman v. Riches*, 16 C. B. 104.

(*k*) *Addie v. The Western Bank of Scotland*, L. R. 1, Scotch App. Cas. 145. See *supra*, p. 1056.

(*l*) *Fenton v. City of Dublin Steam Packet Company*, 8 A. & E. 835; *Dalyell v. Tyrer*, 28 L. J. 52, Q. B.

(*m*) *Weyland v. Elkins*, Holt's N. P. C. 227, Gibbs, C. J.

king's ship of war was held not to be responsible for the damage done to another vessel, through the negligence of his lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the ship at the time, and when the captain was not upon deck, nor was called upon by his duty to be there (n).

To the liability of the master for the negligence of his servant there is, however, an exception: where the party injured is a fellow-workman with the man whose negligence has caused the injury, the master is generally not liable (o). "To bring, however, a case within this exemption, there must be this most material qualification: that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment," *per Lord Brougham* (p). "It is not necessary for this purpose, that the workman causing and the workman sustaining the injury, should both be engaged in performing the same or similar acts. The driver and guard of a coach . . . the engine-man and the man who regulates the switches or signals . . . and so in this case; the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer, in bringing the coal to the surface," *per Lord Cranworth* (q). "It is necessary in each particular case, to ascertain whether the servants are fellow-labourers in the same work; because, although a servant may be taken to have engaged to encounter all risks, which are incidental to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him, on occasions foreign to his employment. When servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case, in the same manner as if the injured servant stood in no such relation to him. There may be some nicety and difficulty in particular cases, in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected, to have been involved, in the service which he undertakes, a satisfactory conclusion may be arrived at," *per Lord Chelmsford* (r). An "underlooker," whose duty it is to examine the roof and prop it up

(n) *Nicholson v. Mounsey*, 15 East, 384.

(o) *Priestley v. Fowler*, 3 M. & W. 1; *Wiggett v. Fox*, 11 Ex. 832; 25 L. J., Ex. 188; *Tarrant v. Webb*, 18 C. B. 797; 25 L. J., C. P. 261; *Patterson v.*

Wallace, 1 Macq. H. L. Cas. 748.

(p) *Bartonshill Coal Company v. McGuire*, 3 Macq. 300.

(q) *Bartonshill Coal Company v. Reid*, 3 Macq. 143.

(r) *Ibid.*

if dangerous, is a fellow-workman, engaged in a common work with a workman in a mine (*s*); so the guard of a train and a plate-layer are fellow-workmen (*t*); so are a carpenter and joiner, employed to paint an engine-shed, and a porter turning a carriage upon a turn-table (*u*); and so are a foreman and an ordinary workman (*v*). They must, however, not only be fellow-workmen, engaged in a common employment, but under the same master (*x*).

Pollock, C. B. and *Blackburn*, J., state the principle upon which these cases depend to be, that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself as between himself and his master, the natural risks and perils incident to the performance of such services, the presumption of law being, that those risks are considered in his wages (*y*).

In a recent appeal case in the House of Lords, from the Court of Session in Scotland (*z*), the *Lord Chancellor Cairns* stated, that he did not think the liability or non-liability of the master to his workman could depend upon the question, whether the author of the accident was not or was in any *technical* sense (*a*) the workman or *collaborateur* of the sufferer. The master is not liable to the servant, unless there had been negligence on the part of the master in that in which he, the master, had contracted or undertaken with his servant to do. The master was bound to select proper and competent persons to superintend and do the work, and to furnish them with adequate materials and resources. When he had done that, he had done all that he was bound to do (*b*). "Workmen do not cease to be fellow-workmen, because they are not all equal in point of station or authority," *per Cranworth*, L.; S. C.

If the master be guilty of negligence, as by finding insecure machinery, and the servant has been induced to work, and thereby received the injury, under the belief that such machinery was secure (*c*), the master will be responsible; yet if the servant continued in the service with full knowledge of any such defect, and

(*s*) *Hale v. Johnson*, 3 H. & C. 589.

(*t*) *Waller v. South Eastern Railway*, 32 L. J., Ex. 205; 2 H. & C. 102.

(*u*) *Morgan v. Vale of Neath Railway*, 33 L. J., Q. B. 26.

(*v*) *Feltham v. England*, L. R. 2, 33 Q. B.

(*w*) *Warburton v. The Great Western Railway*, L. R. 2, Ex. 30.

(*y*) *Morgan v. The Vale of Neath Railway*, 33 L. J., Q. B. 26, and *Waller v. The South Eastern Railway*, 2 H. & C. 102, citing *Hutchinson v. The York, Newcastle, and Berwick Railway*, 5 Ex. 343, and *Farrell v. The Boston Railroad Corporation*, 4 Metcalfe 49, 3 Macqueen, 316. See *Tunney v. The Midland Rail-*

way, L. R. 1, C. P. 296.

(*z*) *Wilson v. Merry*, L. R. 1, Scotch App. 326.

(*a*) It is to be observed that in this case the servant whose negligence was complained of was a foreman or sub-manager, and that the scaffold which had been improperly constructed was finished before the deceased, a miner, was engaged to work.

(*b*) So in *Searle v. Lindsay*, 31 L. J., C. P. 106, and cases there quoted.

(*c*) *Patterson v. Wallace*, 1 Macqueen H. L. Cas. 748; *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30; *Mellors v. Shaw*, 30 L. J., Q. B. 333.

an accident happened, the master would not be liable (*d*), unless the servant continued in the employment in the reasonable expectation of its being repaired (*e*).

A stranger invited by a servant to assist him in his work, and thereupon volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant. If, therefore, whilst engaged in giving such assistance, he is injured through the negligence of a servant, the master is not responsible (*f*).

The principle above discussed, does not exempt from liability to action, a master who himself takes part in the servant's work, and whilst so doing, injures the servant through negligence (*g*).

Where the servant wilfully commits an illegal act, without the direction or assent of the master, an action of trespass will not lie against the master: in such case the servant only is liable (*h*). As if a servant authorized merely to distrain cattle damage feasant, drives a horse from the highway into his master's close, and there distrains it (*i*). So where a servant of the defendant wilfully drove the defendant's chariot against the plaintiff's chaise; an action of trespass having been brought against the defendant, it appeared in evidence, that the defendant was neither present at the time when the injury was committed, nor had he in any manner directed or assented to the act of his servant; it was held, that the action could not be maintained (*j*). So if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the master's employment (*k*). So where an omnibus conductor, who had authority from his master to remove persons who misconducted themselves, used unnecessary violence in removing the plaintiff, the master was held responsible (*l*). Where an injury happened through the misconduct of a servant in driving his master's carriage; it was held, that the master was liable, if the servant were guilty of negligence whilst on his master's business, though he might be going out of the way: but not if the servant used the carriage for his own purpose, and with-

(*d*) *Dynen v. Leach*, 26 L. J., Ex. 221; *Skipp v. Eastern Counties Railway*, 9 Exch. 223; 20 L. J., Ex. 23; *Williams v. Clough*, 28 L. J., Ex. 325.

(*e*) *Holmes v. Worthington*, 2 F. & F. 553, *per Willes*, J.

(*f*) *Potter v. Faulkner*, 31 L. J., Q. 30 B., in error.

(*g*) *Ashworth v. Stanwix*, 3 E. & E. 701.

(*h*) See judgment of *Patteson*, J., in *Lyons v. Martin*, 8 A. & E. 512.

(*i*) *Lyons v. Martin*, 8 A. & E. 512.

(*j*) *M'Manus v. Crickett*, 1 East, 106; *Gordon v. Roll*, 4 Ex. 365; 18 L. J., Ex. 432.

(*k*) *Per Cur.*, *Croft v. Alison*, 4 B. & A. 592.

(*l*) *Greenwood v. Seymour*, 30 L. J., Ex. 327, in error.

out his master's consent (*n*). Where one of a ship's crew wilfully injured another ship, without any direction from or privity of the master; it was held that trespass could not be maintained against the master, although he was on board at the time (*o*). The driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. The defendants had given instructions to their driver not to obstruct any omnibus. The judge directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service; that if the jury believed that the defendants' driver, being irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest of the defendants, then they were responsible; that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible:—Held that this was a proper direction (*p*). If a master command his servant to do an *illegal* act, the servant as well as the master will be liable to the party injured; for the servant cannot plead the command of the master in bar of a trespass (*q*): but in such a case, acceptance of satisfaction by the plaintiff from the master, is a good defence to an action brought against the servant (*r*). An action on the case was brought against a master and his servant for breaking a pair of horses in Lincoln's-Inn Fields, where, being unmanageable, they ran against and hurt the plaintiff: it appeared that the master was absent; but it was held, on motion in arrest of judgment, that the action would lie; for it should be intended that the master sent the servant to train the horses there (*s*).

IV. *Of Actions brought by Masters for enticing away Apprentices and Servants, and for Injuries done to their Servants.*

Of the Action for Seduction, p. 1064.

Pleading, p. 1065.

Evidence, p. 1065.

Damages, p. 1066.

An action on the case may be maintained by a master against any person who entices away his apprentice or servant from his

(*n*) *Joel v. Morison*, 6 C. & P. 501, Parke, B.; *Mitchell v. Cresswell*, 13 C. B. 237.

(*o*) *Bowcher v. Noidstrom*, 1 Taunt. 568. See *Nicholson v. Mounsey*, 15 East, 384, *infra*, p. 1061.

(*p*) *Limpus v. London General Omnibus Company*, 1 H. & C. 526, in error; 32 L. J., Ex. 34, in error. It is to be

observed that the word "wilfully" was not used in the learned judge's direction to the jury.

(*q*) *Sands v. Child*, 3 Lev. 352.

(*r*) *Thurman v. Wild*, 11 A. & E. 453; 3 P. & D. 289.

(*s*) *Michael v. Alestree and another*, 2 Lev. 172.

service (*t*), or who continues to employ such servant after notice, though the defendant did not procure the servant to leave his master, or know, when he employed him, that he was the servant of another (*u*). But the master may, if he choose, waive his action for the tort; and bring an action of *indebitatus assumpsit*, for work and labour done by his apprentice, against the person who tortiously employed him (*x*). So the captain of a ship of war, detaining an apprentice who has been impressed, after verbal notice by such apprentice of his condition, is liable in an action by the master for wages for the service of the apprentice (*y*). But the prize-money gained by an apprentice serving on board a letter of marque ship does not belong to the master, the usage being proved that such money is the property of the apprentice (*z*).

It is not material whether the apprentice be legally apprenticed or not; it is sufficient if he be so *de facto* (*a*).

It has been held, that a master cannot maintain an action for seducing his servant, after his servant has paid him the penalty stipulated by his articles for leaving him (*b*). Neither can an action be maintained for harbouring an apprentice, as such, if the master to whom he was bound was then not a housekeeper, and of the age of twenty-four years (*c*).

A master may maintain an action for an injury done to his servant, as false imprisonment, battery, &c., which deprives the master of his service. The form of action is an action of trespass (*d*), usually termed an action *per quod servitium amisit*, the gist of the action being the loss of service (*e*). In an action of tort for wounding plaintiff's servant, whereby he is disabled from serving, the jury may give damages for the loss of service, not only before action brought, but afterwards down to the time when the disability may be expected to cease (*f*).

(*t*) *Adm. per Cur.*, in *Q. v. Daniel*, 6 Mod. 182.

(*u*) *Blake v. Lanyon*, 6 T. R. 221. See *Lumley v. Gye*, 2 E. & B. 216; 22 L. J., Q. B. 463, where it was held, by a majority of the judges, that the rule of law giving a remedy for enticing away servants is not confined to menial servants, or to such as fall within the statute of labourers, but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer, who is injured by the wrongful act; and that the action for maliciously persuading a servant to quit his service is maintainable wherever there is, at the time of the persuading, a binding contract of hiring and service existing between the parties, whether the service

be then actually subsisting or not.

(*x*) *Lightly v. Clouston*, 1 Taunt. 112. See also *Foster v. Stewart*, 3 M. & S. 191, S. P.

(*y*) *Eades v. Vandeput*, 5 East, 39, n.; 4 Doug. 1.

(*z*) *Carson v. Watts*, 3 Doug. 350.

(*a*) *Barber v. Dennis*, Salk. 68; 6 Mod. 69, S. C., recognized by Lord Hardwicke, C. J., in *R. v. St. Nicholas*, 1 Burr. S. C. 94, 95.

(*b*) *Bird v. Randall*, 3 Burr. 1345; 1 Bl. R. 387.

(*c*) *Gye v. Felton*, 4 Taunt. 876.

(*d*) See *Martinez v. Gerber*, 3 M. & Gr. 88; 3 Scott's N. R. 386.

(*e*) *Jewell v. Harding*, 1 Str. 595, S. C. by the name of *Duel v. Harding*; *Lewis v. Foy*, 2 Str. 944, S. P.

(*f*) *Hodsoll v. Stallebrass*, 11 A. & E. 301; 3 P. & D. 200.

One who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract; consequently an action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master for a personal injury sustained through their negligence by his servant whereby the master loses the benefit of the services of the servant (*g*).

Of the Action for Seduction.

This form of action is frequently adopted by a parent for the purpose of obtaining a compensation in damages for debauching his daughter and getting her with child, and the expenses attending the lying-in. And a *master*, not standing in the relation of a parent, may maintain this action for debauching his servant (*h*). In like manner it may be maintained, for the seduction of an adopted child (*i*). As to the nature of the action, it has been decided, that it may be brought either in trespass for the direct injury, or in case for the consequential damage (*k*). The action may be maintained, although the daughter was of age at the time of the seduction (*l*). But as the action is founded on the loss of service, that must be alleged in the declaration (*m*); and without such an averment, the declaration cannot be supported (*n*). It must be proved that the relation of master and servant (which in these cases the law implies from very slight circumstances) subsisted at the time when the injury was committed (*o*); and the circumstance of the daughter having been under age at that time will not dispense with the necessity of this proof (*p*). It is not necessary, however, to prove a *contract* for service, if the daughter was in fact a servant, nor that she slept in the house (*q*). But evidence must be given of *acts* of service: the slightest, however, will be sufficient, as milking cows and the like (*r*). A girl was bound to serve for eleven hours during the day as a servant in husbandry. She slept at her father's, and after her day's work performed services for her father, by assisting in the domestic affairs, and attending upon a sick mother. This was held a sufficient service to support the action (*s*). There must

(*g*) *Alton v. The Midland Railway*, 19 C. B. (N. S.) 213; 34 L. J., C. P. 292.

(*h*) *Fores v. Wilson*, Peake's N. P. C. 55.

(*i*) *Irwin v. Dearman*, 11 East, 23.

(*k*) *Chamberlain v. Hazlewood*, 5 M. & W. 515; and see *Woodward v. Walton*, 2 N. R. 476, recognized in *Ditcham v. Bond*, 2 M. & S. 436.

(*l*) *Bennett v. Allcott*, 2 T. R. 166.

(*m*) *Satherthwaite v. Dewhurst*, cited in 5 East, 47, n.; 4 Doug. 315.

(*n*) *Grinnell v. Wells*, 8 Scott, N. R. 741.

(*o*) *Postlethwaite v. Parkes*, 3 Burr.

1878, recognized by *Buller*, J., in 2 T. R. 166; *Davies v. Williams*, 10 Q. B. 725; 16 L. J., Q. B. 369.

(*p*) *Dean v. Peel*, 5 East, 45; but see remarks of *Parke*, B., in *Harris v. Butler*, 2 M. & W. 542; these cases and *Blaymire v. Haley*, *infra*, were recognized in *Grinnell v. Wells*, 8 Scott, N. R. 741.

(*q*) *Mann v. Barrett*, 6 Esp. N. P. C. 23.

(*r*) *Per Buller*, J., in *Bennett v. Allcott*, 2 T. R. 168; *per Abbott*, C. J., *Manvell v. Thomson*, 2 C. & P. 304.

(*s*) *Rist v. Faux*, 4 B. & S. 409; 32 L. J., 387 Q. B., in error.

be actual loss of service proved even in the case of a daughter in her father's service (*t*). An action cannot be maintained by a father for the seduction of his daughter, though a minor, while she was entirely in the service of another person; although it be alleged in the declaration, that she was there with the intention, on the part of her father and herself, that she should return to her father's when she quitted her service, unless she should immediately go into another service (*u*). In a case where it appeared that the plaintiff's daughter having been married eight years, and having had two children, and having then separated from her husband for five years, during which the husband had not any access, the wife having returned to her father's house, and lived with him, and acted as his servant, and that during this residence with her father she had been debauched by the defendant and had had a child by him; it was held, that the relation of master and servant might and did exist, and that in the absence of any interference by the husband, it was not competent to the defendant, a wrongdoer, to set up the rights of the husband as an answer to the action (*x*). The right to bring this action does not pass to the assignees in bankruptcy (*y*).

Pleading.—The plea of Not Guilty does not put the plaintiff to proof of the service, but admits it (*z*).

Money cannot be paid into court (stat. 15 & 16 Vict. c. 76, s. 70).

Evidence.—The daughter or servant is a competent witness to prove the case.

Witnesses cannot be examined, on the part of the plaintiff, as to the daughter's general character for chastity, except in answer to evidence adduced by the defendant of *general bad character*. A specific breach of chastity alleged on the part of the defendant will not afford ground for such examination (*a*). Nor does the mere cross-examination of the daughter, to show that she had been guilty of improper conduct, entitle the plaintiff to call other witnesses to her character (*b*). The daughter is not bound to answer, in cross-examination, whether she had not previously been criminal with other men (*c*). Neither can evidence be admitted that the defendant accomplished the seduction by means of a promise of marriage (*d*).

The defendant may give evidence not only of the general bad character of the plaintiff's daughter, but he may also examine

(*t*) *Eager v. Grimwood*, 1 Ex. 61;
16 L. J., Ex. 236.

(*u*) *Blaymire v. Haley*, 6 M. & W. 55.

(*x*) *Harper v. Luffkin*, 7 B. & C. 387.

(*y*) *Howard v. Crowther*, 8 M. & W.
601.

(*z*) Rules of H. T. 1853, r. 16; *Tor-*

rence v. Gibbins, 5 Q. B. 297.

(*a*) *Bamfield v. Massey*, 1 Campb. 460.

(*b*) *Dodd v. Norris*, 3 Campb. 519.

(*c*) *Ibid.*; but see *Bate v. Hill*, 1 C. &
P. 100, *Park, J.*

(*d*) *Dodd v. Norris*, 3 Campb. 519.

witnesses to prove particular acts of sexual intercourse between them and the daughter; this evidence, however, does not go to the verdict, but only in mitigation of damages, if the jury are satisfied that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child alleged to have been gotten by him (e). The defendant cannot give evidence that the plaintiff's daughter has talked of another person than the defendant as the father of her child, unless she has been first asked in cross-examination whether she made use of those expressions (f).

Of the Damages.

Liberal damages are usually given in an action for seduction, and the courts are disinclined to grant new trials merely on the ground of excess in that respect (g). From a laudable desire, as I conceive, to suppress the vice of seduction, against which our criminal code has not provided any punishment, many eminent judges have thought it proper to direct juries, in ascertaining the amount of the damages in this action, to have regard not merely to the injury sustained by the loss of service, a proper compensation for which might amount to a few pounds only, but also to the wounded feelings of the parent or party standing *in loco parentis*. In *Southernwood v. Ramsden*, Middlesex Sittings, after H. T., 19th Feb. 1805, which was an action by a custom-house officer against a cowkeeper for the seduction of the plaintiff's daughter, *per quod servitium amisit*, Lord Ellenborough, C. J., in explaining the nature of this action, said that it was laid as a trespass, and was founded on the injury done to the father by the loss of the service of the child; this was necessary to let in the case, but when this was established, *further damages might be conceded for the loss which the father sustained by being deprived of the society and comfort of his child, and by the dishonour which he receives*. The jury gave 300*l.* damages. Lord Eldon, C. J., had expressed a similar opinion at Bristol Summer Assizes, 1800, in the case of *Chambers v. Irwin*, where the action was brought by an aunt, for the seduction of her niece, against the defendant, a lieutenant in the navy. The chief justice told the jury, that, in calculating the quantum of damages, they were not to look merely to the loss of service, which might amount only to a few pounds, but also to *the wounded feelings* of the party. The jury gave 200*l.* damages. From the amount of the damages in the preceding cases, it will be observed that due respect was paid by the jury to the direction of the judge. It may be remarked, that although this practice of giving damages for the *wounded feelings* of the party can scarcely be reconciled with the strict rule of law,

(e) *Verry v. Watkins*, 7 C. & P. 308, *Alderson, B.*

(f) *Carpenter v. Wall*, 11 A. & E. 803.

(g) *Tullidge v. Wade*, 3 Wils. 18; *Edmondson v. Machell*, 2 T. R. 4; *Bennett v. Allcott*, 2 T. R. 166.

which entitles a person to recover only *secundum allegata et probata* ; yet when the nature of the vice of seduction, and the pernicious consequences which result from it, are duly considered, few persons, (however anxious they may be that the boundaries between civil injuries and criminal offences should be preserved as distinct as possible,) will regret that such a practice has been adopted. Since the first publication of the preceding remarks, an application was made to the court to set aside an inquisition on the ground of excessive damages (*h*), where the plaintiff had declared against the defendant for the seduction of his adopted daughter and servant, and the jury had given 100*l.* damages, although it appeared that the only pecuniary damage which the party had sustained was the being obliged to hire another servant for five weeks during the lying-in. The plaintiff had been a serjeant in a regiment of the line, and the servant was the daughter of a deceased comrade, whom the plaintiff had adopted and maintained. It was urged, that she could only be considered as a servant ; and a case was cited as having been tried, before *Chambre, J.*, at Worcester, where, upon an action brought by a father for the seduction of his natural daughter, that learned judge told the jury they must consider her merely in the character of a servant, and award the plaintiff a compensation for the loss of service only. The court, however, in the present instance, refused the application, Lord *Ellenborough, C. J.*, observing, that the courts had uniformly expressed their reluctance to disturb the verdict in this action merely on the ground of excessive damages, and referred to *Edmonson v. Machell*, 2 T. R. 4, —that it was a case *sui generis*, where, in estimating the damages, the parental damages, and the feelings of those who stood in *loco parentis*, had always been taken into consideration ; and although it was difficult to conceive upon what legal principles the damages could be extended *ultra* the injury arising from the loss of service, yet the practice was now inveterate, and could not be shaken. He added, that the action having been considered in *Edmonson v. Machell* to extend to an aunt, as one standing in *loco parentis*, he thought that the present plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seemed to be equally entitled to maintain the action on account of the loss of service to him, aggravated by the injury done to the object on whom he had thus placed his affection (*i*).

(*h*) *Irwin v. Dearman*, 11 East, 23.

(*i*) 11 East, 24, 25.

CHAPTER XXX.

NUISANCE.

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I. *In what Cases an Action for a Nuisance may be maintained.*

AN action on the case lies for a nuisance to the habitation or land of another; as, if A. build a house so as to hang over the land of B., whereby the rain falls upon B.'s land, and injures it, B. may maintain an action against A. for this nuisance (*a*). The erection of anything offensive so near the house of another, as to render it useless and unfit for habitation, *e. g.*, the erection of a swine sty, lime-kiln (*b*), privy (*c*), smith's forge (*d*), tobacco-mill (*e*), tallow-furnace (*f*), or the like, is actionable. In the case of offensive trades, "it is not necessary that the smells should be *unwholesome*, it is enough if they render the enjoyment of life and property *uncomfortable*" (*g*), but the law does not regard trifling inconveniences, and therefore the injury to be actionable must be such as visibly to diminish the value of property and the comfort and enjoyment of it (*h*). "It need not be noxious to animal or vegetable

(*a*) *Penruddock's case*, 5 Rep. 100, b.; *Kenyon*, C. J., MS.
 2 Roll. Abr. 140, pl. 11. (*f*) *Morley v. Pragnell*, Cro. Car. 510.
 (*b*) *Aldred's case*, 9 Rep. 59, a. (*g*) *Per Lord Mansfield*, C. J., *R. v.*
 (*c*) *Jones v. Powell*, Hutt. 136. *White*, 1 Burr. 337; *R. v. Neil*, 2 C. &
 (*d*) *Bradley v. Gill*, Lutw. 69. P. 485, acc.
 (*e*) *Styan v. Hutchinson*, London Sit- (*h*) *Tipping v. The St. Helens' Smelt-*
 ings after M. T. 40 Geo. III., B. R., *ing Company*, 4 B. & S. 616, in error.

life, but the inconvenience or discomfort must go to the extent of seriously and materially diminishing the ordinary comforts of existence to the occupiers of the property. The question is: Is the inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, or an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" *Per Knight Bruce, L. J. (i).*

Whenever a man carries on a noxious, though lawful trade, as brick-making upon his own land, so that taking all the circumstances into consideration, it amounts to a nuisance to the occupier of an adjoining tenement, an action will lie, and it is no answer that the trade was carried on in a proper and convenient place, and was a reasonable use of the land (*k*). The principle upon which the rule of law proceeds is, *sic utere tuo, ut alienum non lædas* (*l*), "you must so enjoy your own property as not to injure that of another."

To an action of nuisance for carrying on the business of a tallow-chandler in a messuage adjoining the messuage of the plaintiff, it is no plea that the defendant was possessed of his messuage, and the business was carried on before the plaintiff became possessed of the adjoining messuage (*m*). The defendant must at least allege a holding and exercise of the trade of twenty years' duration (*n*), so that a grant may be presumed from the neighbours. If a man carry on a noxious trade or manufacture in a place where it has long been established, and from the manner or extent to which it is carried on there is an *increase* of annoyance, this is actionable (*o*). The fact that in a particular neighbourhood noxious trades have long been carried on, would not seem *per se* to make any difference in the case of a person commencing a fresh one, and such a person would *primâ facie* be liable (*p*). But he might, if he could, show that the neighbourhood was so bad, that his business created no additional annoyance (*r*). Nor is it any answer to plead that the nuisance was created to benefit the public (*s*); or to show that the public benefit more than counter-balanced the public,—*a fortiori*, therefore, the individual,—injury (*t*).

(i) *Walters v. Selfe*, 4 De G. & S. 322.

(k) *Bamford v. Turnley*, 3 B. & S. 66; 31 L. J., Q. B. 286 (in error), overruling *Hole v. Barlow*, 4 C. B. (N. S.) 334; *St. Helens' Smelting Company v. Tapping*, 35 L. J., Q. B. 66 in Dom. Proc.

(l) 9 Rep. 59.

(m) *Bliss v. Hall*, 4 B. N. C. 183.

(n) *Elliotson v. Feetham*, 2 B. N. C. 137. See *Flight v. Thomas*, 10 A. & E.

590.

(o) *R. v. Watts*, M. & M. 281.

(p) *R. v. Neil*, 2 C. & P. 485, *per Abbot*, C. J.

(r) *R. v. Neville*, Peake's N. P. C. 125.

(s) *Heginbotham v. Eastern Steam Packet Company*, 8 C. B. 337.

(t) *R. v. Ward*, 4 A. & E. 35

It must not, however, be inferred from the preceding remarks, that an action can be maintained for a thing done merely to the *inconvenience* of another. An action cannot be maintained for the reasonable use of a person's right, as if a butcher, brewer, &c., use his trade in a convenient place, although it may be to the annoyance of another (*u*); but a convenient place means a place where a nuisance will not be caused to another (*x*). The building a wall which merely intercepts the prospect of another, without obstructing the light, is not actionable (*y*). So the opening a window, whereby the privacy of a neighbour is disturbed, is not actionable; the only remedy in this case is to build on the adjoining land, opposite to the offensive window (*z*). In an action on the case against defendant, for keeping dogs so near the plaintiff's dwelling-house that he was disturbed in the enjoyment thereof, it appeared in evidence, that the defendant kept six or seven pointers so near the plaintiff's dwelling-house, that his family were prevented from sleeping during the night, and were very much disturbed in the day-time. There was not any evidence given for the defendant; notwithstanding which the jury found a verdict for him. On a motion for a new trial, Lord *Kenyon*, C. J., said,—“I know it is very disagreeable to have such neighbours, but we cannot grant a new trial. Cases certainly of this nature have been made the subject of investigation in courts of justice; I remember a case in *Peere Williams* (*a*), ‘where the plaintiff's house being so near the church, that the five o'clock morning bell disturbed her; the plaintiff came to an agreement with the churchwardens, that she should erect a cupola and a clock, and in consideration thereof the five o'clock bell should not be rung. This was considered as a good agreement, and the Chancellor decreed an injunction to stay the ringing the bell.’ If the defendant continues the nuisance, and you think it advisable, you may bring a new action.” Rule refused (*b*). But in *Soltan v. De Held*, 2 Sim. N. S. 133, an injunction, after a trial and verdict at law, was granted against ringing the bells of a Roman Catholic church, so as to occasion annoyance and disturbance, amounting to a nuisance, to the plaintiff, who resided near.

For a nuisance in a *public highway an action* cannot be maintained, unless there be special damage (*c*), *i. e.* a particular injury, beyond that which affects the public at large. But the grantee of an *occupation-way* may maintain an action against the owner of the land over which the way leads for obstructing it, without

(*u*) Com. Dig. “Action upon the case, Nuisance.”

(*x*) *Per Williams, J., Bamford v. Turnley*, 3 B. & S. 76.

(*y*) *Knowles v. Richardson*, 1 Mod. 55; 9 Rep. 58, b.

(*z*) *Per Eyre, C. J., ex relatione Le*

Blanc, J., 3 Campb. 82.

(*a*) *Martin v. Nutkin*, 2 P. Wms. 268.

(*b*) *Street v. Tugwell*, B. R., M. T. 41 Geo. III., MS.; *Iveson v. Moore*, 1 Ld. Raym. 486.

(*c*) 1 Inst. 56, a.; *Rose v. Groves*, 5 M. & G. 616.

proving special damage, although it appears that such way has been used by the public for twelve years and upwards (*d*).

The plaintiff declared that he was entitled to certain tithes, and that his direct way to carry them to his barn was through a certain highway: that the defendant had stopped up the highway by a ditch and gate; and that he (the plaintiff) was consequently forced to carry his tithes by a longer and more difficult way. It was moved, in arrest of judgment, that, this being laid in a common highway, the obstruction was a common nuisance, and that, therefore, the action would not lie; but it was resolved by the court, that the action was maintainable; for they said, that this rule, "that the action will not lie for that which every one suffers," ought not to be taken too largely: in this case the plaintiff had sustained a particular damage; for the labour and pains which he was forced to take with his cattle and servants, by reason of the obstruction, might be of more value than the loss of a horse, which had been held to be sufficient damage to maintain such action (*e*). Where the plaintiff (*f*) declared that he was navigating his barges, laden with goods, along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges, *per quod* the plaintiff was obliged to convey his goods a great distance overland, and was put to trouble and expense in the carriage of his goods overland; it was held that this was sufficient special damage, for which an action upon the case would lie (*g*). Where there is direct special damage, an action on the case lies for not repairing, as well as for a nuisance in a highway, if an individual is liable to repair (*h*); but otherwise, where the county or parish is to repair the highway (*i*).

Where the defendant had placed timber upon a public navigable river (which is not necessarily a nuisance (*k*)), in such a manner as to prevent the customers coming to the plaintiff's house; it was held, that the plaintiff had a sufficient cause of action, whether the obstruction was a nuisance to the highway or not (*l*). So where the plaintiff, the occupier of a shop in a public street, had suffered loss in his business, in consequence of passengers having been diverted from the thoroughfare by defendant's continuing an authorized obstruction across it an unreasonable time (*m*). But this case seems to be overruled by the case of *Ricket v. The Metropolitan Railway*, L. R. 2 H. of L. 175, on the ground that the damage was too remote. Where the plaintiff was

(*d*) *Allen v. Ormond*, 8 East, 4.

(*e*) *Hart v. Bassett*, T. Jones, 156.

(*f*) *Chichester v. Lethbridge*, Willes, 73.

(*g*) *Rose v. Miles*, 4 M. & S. 101.

(*h*) 1 Inst. 56, a. n. (2), Hargr. edit.

(*i*) *Russell v. Men of Devon*, 2 T. R. 671.

(*k*) *R. v. Betts*, 16 Q. B. 1022.

(*l*) *Rose v. Groves*, 5 M. & G. 613.

(*m*) *Wilkes v. Hungerford Market Company*, 2 B. N. C. 281.

delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey so often in a day as he otherwise could (*n*). But where the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road or else to remove the obstruction; it was held that he was not entitled to maintain the action (*o*).

Although where one possessed of land abutting on a public foot-way makes an excavation on it, immediately adjoining the public way, and which he leaves unfenced, is liable for injuries sustained by a passenger falling into such excavation (*p*), yet he is not liable if such excavation be made at some distance from the way (*q*).

Of the Right to the Use of Light.

If the owner of the adjacent land erects a building so near the house of the plaintiff as to prevent the air and light from entering and coming through the plaintiff's windows an action will lie. Formerly it was held, that a party could not maintain an action for an obstruction of lights unless he had gained a right in the lights by prescription (*r*); and in conformity with this rule, it was usual to state in the declaration that the house was an ancient house, wherein were ancient windows, through which the light had entered, and had been used to enter, from time immemorial (*s*). But afterwards it was held, that upon evidence of an adverse enjoyment of lights for twenty years or upwards, unexplained, a jury might be directed to *presume* a right by grant or otherwise, even though no lights had existed there before the commencement of the twenty years. But if the period of enjoyment fell short of twenty years, then other circumstances than the mere length of time must have been brought in aid in order to raise the presumption of the plaintiff's right (*t*).

The third section of the Prescription Act (2 & 3 W. IV. c. 71), enacts:—"That when the access and use of lights to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption (*u*), the right thereto shall be deemed absolute and indefeasible, any local use or custom to the contrary notwithstanding (*x*), unless it shall appear that the same was enjoyed by

(*n*) *Greasly v. Codling*, 2 Bingh. 263.

(*o*) *Winterbottom v. Lord Derby*, L. R. 2, Ex. 317. See *Beckett v. The Midland Railway*, L. R. 3 C. P. 82, where the cases on this subject are reviewed.

(*p*) *Barnes v. Ward*, 9 C. B. 392.

(*q*) *Hardcastle v. The South Yorkshire Railway*, 28 L. J., Ex. 139.

(*r*) *Bowry v. Pope*, Cro. Eliz. 118.

(*s*) See Co. Ent. tit. Action sur le

Case, pl. 17.

(*t*) 2 Wms. Saund. 175, a.

(*u*) As to the distinction between interruption and mere discontinuance of user, see p. 385.

(*x*) The custom of London, for instance, by which every citizen might build upon an ancient foundation a house as high as he pleased. *Truscott v. Merchant Taylors' Company*, 11 Ex. 855.

some consent or agreement expressly given for that purpose by deed or writing." The right, therefore, to what is called "an ancient light," is now a matter of positive enactment, and is not vested on any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. After an enjoyment of an access of light for 20 years without interruption, the right is declared by the statute to be *absolute and indefeasible*. It would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover this absolute and indefeasible right which is the creation of the statute is not subjected to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed during the prescribed period, is declared to be not liable to be defeated. Hence if A. has acquired the right to access of light to a window and then opens numerous other windows overlooking B.'s land, the latter cannot shut out the light to the new windows if he cannot do so without obstructing the access of light to the original window (*y*). Actual enjoyment of light under a verbal permission from a person having a right to obstruct is sufficient, the words "claiming right thereto" being omitted in the 3rd section (*z*). Nor is payment of rent, under a verbal agreement, for the use of the light an interruption within the section (*a*). It was held by the Exchequer, in a considered judgment delivered by *Parke, B.*, that the 3rd section converts into a right such an enjoyment only of access of light over adjoining land as has been enjoyed *as an easement*, distinct from the enjoyment of the land itself; if, therefore, the dominant and servient tenement be during the prescribed time in the occupation of the same person no right is acquired (*b*). This would seem, however, to be open to some doubt, since the decision in *Jones v. Tapling*.

It is well established by the decided cases, that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights, for no man shall derogate from his own grant (*c*). Total privation

(*y*) *Tapling v. Jones*, 20 C. B. (N. S.) 166; 34 L. J., 342 C. P., in Dom. Proc.; overruling *Renshaw v. Bean*, 18 Q. B. 112; and *Hutchinson v. Copestake*, 9 C. B. (N. S.) 863.

(*z*) *Mayor of London v. The Pewterers' Company*, 2 M. & Rob. 409.

(*a*) *The Plasterers' Company v. The Parish Clerks' Company*, 6 Ex. 630.

(*b*) *Harbridge v. Warwick*, 3 Ex. 552.

(*c*) *Per Tindal, C. J., Swansborough v. Coventry*, 9 Bingh. 309. See *Blanchard v. Bridges*, 4 A. & E. 192.

of light is not necessary to sustain the action. If the plaintiff can prove that, by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient (*d*). If an ancient window be enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window, than was anciently enjoyed (*e*).

By sect. 4 of the Prescription Act—"Each of the respective periods of years hereinbefore mentioned (*f*) shall be deemed and taken to be the period next before some suit or action wherein the claim or matter shall have been brought into question (*g*), and no act or other matter shall be deemed to be an *interruption* within the meaning of this statute, unless the same shall have been submitted to, or acquiesced in, for one year after the party interrupted shall have had, or shall have, notice thereof, and of the person making or authorizing the same to be made."

The clause, requiring that the interruption to bar a prescriptive title shall have been acquiesced in for more than a year, is not limited to obstructions preceded and followed by portions of the twenty years, but applies also to obstructions *ending* with that period. Where A. had the free access of light and air through a window of his house for nineteen years and 330 days, and B. then raised a wall which obstructed the light, and the obstruction was submitted to for thirty-five days, when A. commenced an action, it was held, that the right of action was complete; and that the twenty years' enjoyment was to be reckoned from the commencement of the enjoyment to the time of bringing the action (*h*).

The statute says, that a person *is* entitled to the access and use of light, if his enjoyment commenced twenty years next before the bringing of an action in which the right is contested (provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in for a year): it does *not* say that a person is *disentitled*, if he has *not* enjoyed such access, and use for that period. A right to light by immemorial prescription may be lost by abandonment. "The right is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinued the occupancy. If the party who has acquired the right *once* ceases to make use of the light and air, which he has appropriated to his own use, *without showing any intention to resume the enjoyment*, he must be taken to have abandoned the right (*i*),

(*d*) *Cotterell v. Griffiths*, 4 Esp. 69; *Clarke v. Clarke*, 1 L. R., Ch. App. 21; *Yates v. Jack*, 1 L. R., Ch. App. 299.

(*e*) *Chandler v. Thompson*, 3 Campb. 80.

(*f*) See *Clayton v. Corby*, 2 Q. B. 813, *post*, p. 1079.

(*g*) See *ante*, p. 384.

(*h*) *Flight v. Thomas*, 8 Cl. & F. 231; *S. C.* (in Exch. Cham.) 11 A. & E. 688.

(*i*) *Moore v. Rawson*, 3 B. & C. 322, *per Littledale, J.*, *Stokoe v. Singers*, 26 L. J., Q. B. 257.

e. g., if he erect a blank wall where the ancient windows were. Such right may therefore be lost in a much less period than twenty years, *Moore v. Rawson*; and on the other hand *may* be preserved for a much longer period (*k*); and the question of intention is for the jury (*l*).

Of the Right to the Use of Water.

"The right to the use of water rests on clear and settled principles. *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the *land* covered by the stream, but there is *no property in the water*. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years (*m*). When it is said that a riparian proprietor may not diminish the quantity of water that would otherwise descend to the proprietor below, this is not to be taken in its literal sense, as he has a right to a reasonable use of the water for his domestic purposes and for his cattle, without regard to its causing a deficiency to the proprietor below; and, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, as for irrigation, provided that he does not thereby interfere with the rights of other proprietors (*n*). "Every proprietor of land on the banks of a natural stream has a right to the use of the water, provided he so uses it as not to work any material injury to the right of the proprietors above or below him in the stream," *per*

(*k*) See *Ward v. Ward*, 7 Ex. 838; *e. g.*, if a man were to pull down a house with ancient lights, and commence to rebuild it, but in consequence of litigation or otherwise, the progress of the rebuilding were stopped for many years.

(*l*) See *Lovell v. Smith*, 3 C. B., N. S. 120.

(*m*) *Per Leach*, V. C., in *Wright v. Howard*, 1 Sim. & Stu. 190, adopted by Lord Tenterden, C. J., in *Mason v. Hill*. It will be observed that it is laid down in *Chasemore v. Richards*, 7 H. of L. Cas. 349, and nearly all the modern cases, that the right of the water of a

natural stream belongs of right to the proprietors of the adjoining land. There seems to be some doubt thrown upon this definition, see *Lord v. Commissioners of Sydney*, 12 Moore P. C. Cas. 496. There has been no case which has expressly turned upon the fact of the bed of a river belonging to one person, and the soil of the adjoining land to another. It is asserted by some, that riparian rights depend solely upon the right to the soil of the bed of the river.

(*n*) *Miner v. Gilmour*, 12 Moo. P. C. C. 156; *Wood v. Waud*, 3 Ex. 748.

Tindal, C. J. (o). The proprietor of land contiguous to a stream may, as soon as he is injured by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action, that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in the altered course (*p*); for flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream, and take into his possession, and that during the time of his possession only (*q*).

By usage a riparian proprietor may acquire a right to use the water in a manner not justified by his natural right, but such acquired right has no operation against the natural rights of a landowner higher up the stream; unless the user by which it was acquired affects the use which such landowner has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*r*). A right to a watercourse is not destroyed by the owner altering the course of the stream; and the owner may establish his claim, notwithstanding an interruption within twenty years of action brought (*s*). A right to the use of water flowing in a stream, and *publici juris*, becomes private by appropriation, but may become again *publici juris* by relinquishment (*u*). It is not necessary to prove special damage; an injury to the *right* only is sufficient (*u*). An encroachment upon the bed of a running stream even, though it has not been found that immediate damage has been sustained, or is likely to be sustained, is an obstruction constituting an injury, which other riparian proprietors have a right to have removed and for which an action lies (*x*). The occupier of a mill, built on the site of an old mill, which has existed for forty years, may maintain an action for forcing back water, and injuring his mill, although he has not enjoyed the mill precisely in the same state for twenty years; and it is no defence to such an action that he has within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one (*y*).

(*o*) *Sampson v. Hoddinott*. It is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application, *per Parke, B., Embrey v. Owen*. In the case of abstraction, a diminution of one fifth has been held to give a cause of action. *Wood v. Waud*.

(*p*) *Mason v. Hill*, 3 B. & Ad. 304. See 5 B. & Ad. 1, *S. C.*; *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

(*q*) *Embrey v. Owen*, 6 Ex. 353.

(*r*) *Sampson v. Hoddinott*, C. B. (N. S.) 611.

(*s*) *Hall v. Swift*, 4 B. N. C. 381.

(*t*) *Liggins v. Inge*, 7 Bingh. 682. See *Moore v. Rawson*, 3 B. & C. 322.

(*u*) *Wood v. Waud*, 3 Ex. 748.

(*x*) *Bickett v. Morris*, L. R. 1 Scotch App. 6.

(*y*) *Saunders v. Newman*, 1 B. & Ald. 258. See *Rochdale Canal Company v. Radcliff*, 18 Q. B. 287.

One riparian proprietor may not disturb the natural flow of a stream, as by detaining the water so as to injure another proprietor (z), and the right to have a stream in its natural state extends to its quality as well as its quantity, and its pollution is a cause of action (a).

With respect to *artificial* watercourses, such as canals, mill-leets, ditches, &c., similar rights may in some cases be acquired. "The proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible" (b). But where from the nature of the case it is obvious that the enjoyment of the watercourse depends upon temporary circumstances, and is not of a permanent character, as in the case of a mine adit (c), or the outfall of a drain (d), no such right is obtained, either by presumption of a grant, or under the 2 & 3 Will. IV. c. 71. No action therefore lies in such a case for the *diversion* of the water, against a party through whose land it passes before it reaches the plaintiff's land, though an action would lie against such a person for its pollution (e).

With regard to the right to the enjoyment of a *subterranean* spring, or of a well, supplied by such spring, "We think," said *Tindal*, C. J., in *Acton v. Blundell* (f), "that the case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock or porous ground, or veinous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of action."

In *Dickinson v. The Grand Junction Canal Company* (g), it was held, that the plaintiff, the proprietor of ancient mills on the river Gade, was entitled to maintain an action against the defendants; who had, by sinking a well on their own land and by means of a

(z) *Sampson v. Hoddinott*, 1 C. B. (N. S.) 611.

(a) *Mason v. Hill*, 5 B. & Ad. 19.

(b) *Per Lord Denman*, C. J., *Magor v. Chadwick*, 11 A. & E. 571. See *Beaston v. Weate*, 5 E. & B. 986.

(c) *Arkwright v. Gell*, 5 M. & W. 203.

(d) *Greatrex v. Hayward*, 8 Ex. 291.

(e) *Wood v. Waud*, 3 Exch. 748, in which case the plaintiff had enjoyed the water flowing from a colliery for sixty years. See *Whaley v. Laing*, 2 H. & N. 476; 27 L. J. Ex. 422, and *Gaved v. Martyn*, 19 C. B. 732.

(f) 12 M. & W. 324.

(g) 7 Ex. 282.

pumping engine, abstracted water, which would in its natural course, *whether by an underground watercourse*, or by percolating through the strata, have flowed or percolated into a tributary of the above-mentioned river, and so eventually have reached the plaintiff's mills. That case, however, so far as it depends on the above ground, except so far as it applies to subterranean water *flowing in a defined natural channel*, must be considered as over-ruled by *Chasemore v. Richards*, 7 H. of L. Cas. 349, where the House of Lords held, affirming the judgment of the Exchequer Chamber, that the owner of an ancient mill on the banks of a river, *cannot* maintain an action against a landowner who sinks a deep well on his own land, and by pumps and steam-engines diverts the underground water which would otherwise have percolated the soil and flowed to the plaintiff's mill. And the same rule applies to *surface* water, flowing over a person's land in no definite channel, although the landowner, by appropriating the water, thereby prevents it from reaching a watercourse which it previously supplied (*h*).

Water rights cannot be dealt with in gross and assigned, unless in conjunction with land abutting on the stream (*i*).

By 2 & 3 Will. IV. c. 71, s. 2,—No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way (*k*), or other easement, "or to any watercourse or the use of any water," &c., when such way, &c. shall have been actually enjoyed by any person claiming right thereto without interruption (*l*), for the full period of twenty years (*m*), shall be defeated by showing only that such way, &c., was first enjoyed at any time prior to such period; but such claim may be defeated in any other way by which the same is now liable to be defeated (*n*); and where such way, &c., shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose, by deed or writing (*o*).

A claim by the owner of a copper mine to let off the water from his mine, impregnated with metallic substances, into a watercourse upon the land of another, is a claim to a watercourse within the above section (*p*). And so is a claim to throw stones, rubble, and

(*h*) *Broadbent v. Ramsbotham*, 11 Exch. 602. And see *Smith v. Kenrick*, 7 C. B. 515, as to flooding adjoining mines.

(*i*) *Stockport Waterworks Company v. Potter*, 3 H. & C. 300. See *Nuttall v. Bracewell*, 2 L. R., Ex. 1.

(*k*) See *post*, p. 1080.

(*l*) See *ante*, p. 385.

(*m*) See *ante*, p. 384.

(*n*) *e. g.*, "by proof of a grant, or of a licence, parol or written, for a limited period, comprising the whole or part of

the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised." *Per Cur.*, *Bright v. Walker*, 1 C. M. & R. 219.

(*o*) *i. e.*, before the forty years commenced, because a *parol* licence *within* that period is sufficient, as disproving an enjoyment "as of right." *Tickle v. Brown*, 4 A. & E. 369.

(*p*) *Wright v. Williams*, 1 M. & W. 77.

the refuse of a tin mine into a running stream (*q*). But the right to the passage of air (as for a windmill), is not a right to an easement within the above section (*r*).

Enjoyment by persons "claiming right" under the above section (or "as of right" in section 5), means an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions, of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether the right so claimed be strictly legal as by prescription and adverse user, or by deed, or whether, though not strictly legal, yet it be lawful to the extent of excusing a trespass (*s*). The right must also be such as could, previously to the statute, have been inferred to exist by custom, prescription, or non-existing grant. "The act does not alter the *nature* of the right necessary to give a legal title:" and facts, showing that the right claimed is not such a one, may be replied to a plea of prescription under the statute (*t*).

The enjoyment of an easement under the foregoing section means a continuous enjoyment, *as of right*, of the easement, *as an easement*, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the twenty years (*u*); and evidence of unity of possession may be given under a traverse of the enjoyment, because it disproves enjoyment as of right (*x*). Unity of possession merely *suspends* a prescriptive easement; there must be an unity of ownership to destroy it (*y*). Where a party became seised in fee of one set of premises, and possessed of a chattel interest in another, the owner of which latter had previously enjoyed an easement in the former; it was held, that such unity of possession of the land *a quâ* and *in quâ* the easement existed, would operate only to suspend, and not to extinguish the easement (*z*).

The principle upon which prescription rests cannot be applied to underground streams; "it has not been with the permission of the proprietor of the land that the streams have flowed into the river for twenty years, '*qui non prohibet quod prohibere potest assentire videtur.*' But how could he prevent it?" *per Lord Wensleydale* (*a*).

By sect. 8,—When any land or water, upon, over, or from which any way or other watercourse or use of water shall be enjoyed, shall be held under any term of life, or for years, exceeding three,

(*q*) *Carlyon v. Lovering*, 1 H. & N. 784.

(*r*) *Webb v. Bird*, 13 C. B. 841.

(*s*) *Tickle v. Brown*, 4 A. & E. 369.

(*t*) *Kinlock v. Neville*, 6 M. & W. 795.

(*u*) *Onley v. Gardiner*, 4 M. & W. 496.

(*x*) *Clayton v. Corby*, 2 Q. B. 813.

(*y*) *Per Bayley, B.*, in *Canham v. Fisk*, 2 C. & J. 126.

(*z*) *Thomas v. Thomas*, 2 C. M. & R. 34.

(*a*) *Chasemore v. Richards*, 7 H. of L. Cas. 349.

the time of the enjoyment of any such way, &c., during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years after the end or determination of the term, be resisted by the reversioner. The 6th section disallows any presumption in favour of a claim upon proof of enjoyment for any *less* period of time than may be applicable under the act to the nature of the right claimed. The statute substitutes positive proof of enjoyment during a limited number of years, for the immemorial enjoyment formerly alleged, and in aid of which, as it never could be proved throughout, presumption was admitted (*b*).

Of Ways.—Where a way had been used adversely and under a claim of right, for more than twenty years, over land in possession of a lessee who held under a lease for lives granted by the bishop of Worcester; it was held, that under the above act, this user gave no right as against the bishop, and did not affect the see; and that, as the user did not give a title as against *all* persons having estates in the locus in quo, it gave no title as against the lessee and the persons claiming under him, and that no title was gained by an user, which did not give a valid title as against the bishop, and permanently affect the see (*c*). So where the land over which the right was claimed had been under lease for the first seven years out of the twenty (*d*). But where a way has been used over land in the hands of a succession of tenants, and express notice to the landlord is proved, a grant may, it seems, be presumed (*e*).

In a plea under this statute, it is sufficient and necessary to allege that the user existed for the prescribed time before the *commencement of the suit* (*f*). An averment, indeed, of its existence *before the act complained of*, would make the plea bad (*g*). The plea must be supported by evidence of actual user in the first year (*h*), and in the last year of the period relied upon (*i*). Evidence of user of a way with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of way for all purposes; but the extent of the right is a question for the jury in each particular case (*j*). Such right is destroyed by unity of possession, even after the completion of the prescribed period of twenty or forty years (*k*). An immemorial right of way may be lost by abandonment (see *ante*, p. 1074); but it is not lost by non-user for upwards of twenty years, the user

(*b*) *Per Coleridge, J., Bailey v. Appleyard*, 8 A. & E. 161. See *ante*, p. 384.

(*c*) *Bright v. Walker*, 1 C. M. & R. 211.

(*d*) *Winship v. Hudspeth*, 10 Ex. 5.

(*e*) *R. v. Barr*, 4 Campb. 16; where Lord Ellenborough, C. J., said that notice might be inferred from the notoriety and publicity of the user; but that case was one of a *public* way, and the above remark can scarcely be applied to a *private* one.

(*f*) *Wright v. Williams*, 1 M. & W. 77.

(*g*) *Hughes v. Robins*, 15 M. & W. 241.

(*h*) *Bailey v. Appleyard*, 8 Ad. & E. 161; *Carr v. Foster*, 3 Q. B. 581.

(*i*) *Parker v. Mitchell*, 11 Ad. & E. 788; *Lowe v. Carpenter*, 6 Ex. 825. See *ante*, p. 385.

(*j*) *Cowling v. Higginson*, 4 M. & W. 245. See *Henning v. Burnet*, 8 Ex. 187.

(*k*) *Battishill v. Reed*, 18 C. B. 696.

having been discontinued by reason of the party's having had a more convenient way (*l*). Discontinuance of user, by reason of another way being substituted by parol agreement, is no evidence of abandonment (*m*).

Of Pews.—A seat in a church may be annexed to a house, either by a faculty or by prescription, which supposes a faculty (*n*). Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of prescription at least, if indeed they can do so by prescription (*o*). Nor in the case of a pew in the body of a church, can an action at common law be maintained for a disturbance, unless the pew be annexed to a house in the parish. It is only on account of the pew being annexed to a house, that the temporal court can take cognizance of any intrusion into it (*p*). "As to an aisle or chancel, that indeed may belong to a non-parishioner, for the case of an aisle or a chancel is guided by other considerations" (*q*). Where a party claims a right against the ordinary, he ought to show a title by repairing, &c., but not in an action on the case against a trespasser or tort-feasor. In such case it is neither necessary to allege or prove repairs (*r*). An old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage (under whom plaintiff claimed), in consideration of his using it, is admissible evidence, being made by the churchwardens within the scope of their official authority, and as showing the reputation of the parish upon the right (*s*). The right to sit in a pew may be apportioned in consequence of the messuage, to the owners and occupiers of which it was originally granted, becoming subdivided: thus three or four families may become entitled to use a pew, and a question may arise, how many persons are entitled to use the pew in respect of each of the subdivisions: that is, however, a matter to be settled among the respective owners: the churchwardens have no right to interfere (*t*).

II. *By whom and against whom an Action for a Nuisance may be maintained.*

If the nuisance be to the damage of the reversionary as well as the possessory interest, an action may be brought as well by the

(*l*) *Ward v. Ward*, 7 Exch. 838.

(*m*) *Lovell v. Smith*, 3 C. B., N. S.

120.

(*n*) *Per Buller, J.*, in *Griffith v. Matthews*, 5 T. R. 296.

(*o*) *Byerley v. Windus*, 5 B. & C. 1.

See *Hallack v. University of Cambridge*, 1 Q. B. 593.

(*p*) *Mainwaring v. Giles*, 5 B. & Ald. 356.

(*q*) *Fuller v. Lane*, 2 Add. 427.

(*r*) *Bunton v. Bateman*, 1 Lev. 71; *Ashley v. Freckleton*, 3 Lev. 73; *Kenrick v. Taylor*, 1 Wils. 326; *Sayer*, 31.

(*s*) *Price v. Littlewood*, 3 Campb. 828.

(*t*) *Harris v. Drewe*, 2 B. & Ad. 164.

reversioner as by the tenant in possession, and each will be entitled to recover damages commensurate with the injuries, which their respective interests may have sustained (*u*). If anything be done to destroy the evidence of title, which is a question for the jury, an action is maintainable by the reversioner (*x*). Thus a reversioner may maintain an action for the obstruction of an ancient light, and, in the event of its not being removed, for the continuance, for the proof of his title is rendered more difficult at a future time (*y*). So for the permanent obstruction of a right of way appurtenant to his premises (*z*). But where the acts of trespass did not amount to any permanent injury to the land, but were made in exercise of an alleged right of way; it was held, that the reversioner could not maintain an action in respect thereof, for no right was gained by such user while the land was in the possession of his lessee (*a*).

The action may be maintained against the person who erects the nuisance: or against his alienee, who permits the nuisance to be continued, *after request made* to him to remove or abate it (*b*). To an action of trespass *qu. cl. fr.*, it is not a good plea, that the defendant entered on the land to abate a nuisance, if the plea does not show a notice or request to the plaintiff to remove it; or that the plaintiff was himself the original wrongdoer, either by having placed the nuisance there, or by his default in not performing some obligations incumbent on him; or that the nuisance is immediately dangerous to life or health (*c*). If the party, against whom a verdict in an action of this kind has been recovered, does not abate the nuisance, another action may be brought for continuing the nuisance, in which the jury will be directed to give large damages. *Note*.—It is usual, in the first action, to give nominal damages only.

Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue such erection. Therefore, where the trustees of a turnpike-road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass; it was held, that after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring

(*u*) *Bedingfield v. Onslow*, 3 Lev. 209.

(*x*) *Young v. Spencer*, 10 B. & C. 152.
See *Alston v. Scales*, 9 Bingh. 3.

(*y*) *Shadwell v. Hutchinson*, 2 B. & Ad. 97.

(*z*) *Kidgill v. Moor*, 9 C. B. 364.
What is a permanent injury; see *Simpson v. Savage*, 1 C. B., N. S. 347.

(*a*) *Baxter v. Taylor*, 4 B. & Ad. 72.
See 2 & 3 Will. IV. c. 71, s. 8, *ante*, p. 1079. See *Tucker v. Newmun*, 11 A. & E. 40.

(*b*) *Penruddock's case*, 5 Rep. 101, a.

(*c*) *Jones v. Williams*, 11 M. & W. 176.

another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*d*).

Tenant for years erected a nuisance, and afterwards made an underlease to I. S. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance, after he had made an underlease. *Et per Cur.* it lies; for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and, therefore, ought to answer the damage it occasions (*e*). And the action lies against either at the plaintiff's election, *Cromb. Car.* 373, 555. So where the owner of land lets it with a nuisance already existing (*f*); so the purchaser of the reversion, if he purchase the premises with the nuisance upon them, is liable, and this, although he may have no opportunity of removing the nuisance; *secus*, if it be created *after* he has bought the land, unless he has had an opportunity of determining the tenancy (*g*). So where the owner lets land to a tenant from year to year, with a nuisance upon it, and then devises it, and dies, an action lies against the devisee, by a party injured, the devisee having received rent, and not having terminated the tenancy; and it is no defence that he was unaware of the nuisance (*h*).

An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain, until by reason of the want of reparation they fall upon and injure the house of an adjoining owner (*i*).

But "where a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord is not responsible for the acts of the tenant" (*k*). In an action on the case for continuing a nuisance to the plaintiff's market by a building, which excluded the public from a part of the space in which the market was lawfully held; it was held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and could not do so without being guilty of a trespass; for *per Cur.*, that is in consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by showing their inability to remove it without exposing

(*d*) *Holmes v. Wilson*, 10 A. & E. 503;
Bowyer v. Cook, 4 C. B. 236, *acc.*

(*e*) *Rosewell v. Prior*, 2 Salk. 460.

(*f*) Or (*semble*) if the occupation of it must necessarily create a nuisance.

(*g*) *R. v. Pedley*, 1 A. & E. 824.

(*h*) *Gandy v. Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151.

(*i*) *Todd v. Flight*, 9 C. B. (N. S.) 377; 30 L. J., C. P. 21

(*k*) *Per Cur.*, *Rich v. Basterfield*, 4 C. B. 804.

themselves to another action (*l*). The cleansing of drains and sewers is *primâ facie* the duty of the occupier (*m*).

Case lies against the landlord of a house demised by lease, who, under his contract with his tenants, himself employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen (*n*). But where A. contracted with the parish to pave a certain district, and entered into a *sub-contract* with B. to pave a street therein, A. supplying and bringing the materials, and preparatory to the paving, the stones were laid by labourers employed by B. on the pathway, and there left unguarded and obstructing the same, and C. fell over them and broke his leg; it was held, that B. was liable and not A. (*o*). There is no distinction between injuries arising from the negligent management of an animal or other personal chattel, and that resulting from the negligent management of fixed real property with regard to the party liable (*p*); except in certain cases between landlord and tenant (*q*).

It was for some time considered that trustees of roads, commissioners of sewers, and such like bodies, were not responsible for injuries arising from nuisances from the works of which they had the superintendence, nor for injuries caused by the negligence of their servants, to the same extent that private bodies are on the ground that they were unpaid bodies, acting for the public benefit; but this can no longer be considered as law, it having been decided by the House of Lords, in *The Mersey Docks Board v. Gibbs* (*r*), that trustees appointed by statute for public purposes, with power to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damages sustained by reason of the default of their servants or agents, to the same extent as absolute owners levying tolls for their own profit, although there has been no improper conduct on the part of such trustees.

When a question arises as to whether an employer or a contractor is liable, it is necessary to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation upon him to perform, and the liability for the negligence of those who are employed in the work. Liability for doing an improper act depends upon the order given to do that thing, and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done, and in these two cases it is quite immaterial

(*l*) *Thompson v. Gibson*, 7 M. & W. 456.

(*m*) *Russell v. Shenton*, 3 Q. B. 449.

(*n*) *Leslie v. Pounds*, 4 Taunt. 649; *Sadler v. Henlock*, 4 E. & B. 570.

(*o*) *Overton v. Freeman*, 11 C. B. 867. Where the work contracted for is unlawful, the employer is responsible,

although the injury is occasioned by the negligence of a contractor. *Ellis v. Sheffield Gas Company*, 2 E. & B. 767.

(*p*) *Preddie v. London and North Western Railway*, 4 Exch. 244.

(*q*) *Rich v. Basterfield*, 4 C. B. 804.

(*r*) 35 L. J., Ex. 225, in Dom. Proc.; 11 H. L. Cas. 686.

whether the actual actors are servants or not. Liability for collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commit some casual act of wrong or negligence, the employer is not answerable; but where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences: and if the performance of a duty incumbent upon an employer be omitted, the fact of his having entrusted its performance to a contractor, who also neglects it, furnishes no excuse (s).

III. *Pleadings.*

By 2 & 3 Will. IV. c. 71, s. 5, in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient. For the remainder of this section, see *ante*, p. 386.

By Pl. R. 16, T. T. 1853, in actions for torts, the plea of Not Guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *E. g.* In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of Not Guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

The plea of "Not Guilty," puts in issue both the act complained of, and its consequences. By this plea, the defendant says, "I am not guilty of erecting a building which is a nuisance" (t). In an action for continuing a nuisance, it puts in issue the continuance only (u). "Not Guilty," pleaded to a declaration in case for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere *fact* of the diversion, and admits the right to the use of the stream as claimed (x).

(s) *Mersey Docks v. Gibbs*; 35 L. J. Ex. 225; *Pickard v. Smith*, 10 C. B. 480; *Hole v. Sittingbourne Railway*, 6 H. & N. 500; *Butler v. Hunter*, 7 H. & N. 828; *Coe v. Wise*, L. R. 1, Q. B. 711, in error. See further, *ante*, p. 1060.

(t) *Per Parke, B., and Alderson, B.*, in *Norton v. Scholefield*, 9 M. & W. 665.

(u) *Greenfield v. Edgcombe*, 7 Q. B. 661.

(x) *Frankum v. Earl of Falmouth*, 2 A. & E. 452.

Statute of Limitations.—The statute begins to run from the time of the occurrence of the consequential damage (*y*). Where the plaintiff's house was damaged by the sinking of the soil within six years of action brought, but the working of the mine which had caused the injury had been discontinued for more than six years, the statute was held no bar (*z*).

IV. Evidence, &c.

The plaintiff must be prepared to prove his possession of the land, house, &c., affected by the nuisance, and the continuance or erection of the nuisance by the defendant, as the circumstances of the case may require, and also the injury thereby sustained. If the action be by the reversioner, and the tenant holds under a written agreement, it must be produced (*a*). *Secus*, if the tenant be plaintiff. This action being local in its nature, the nuisance must be proved to have been committed in the county where the venue is laid (*b*). But it is not necessary that the gravamen should be described with any local certainty. It is sufficient if the declaration point out the gravamen with certainty enough to enable the defendant to have notice of it (*c*). Notice to remove a nuisance left at the premises is evidence against a subsequent occupier (*d*).

The defendant may prove that the plaintiff gave him leave by parol to do the act which occasioned the nuisance, as by erecting a skylight over his own area, which interfered with the plaintiff's ancient lights, and that it was done under that permission (*e*); for a licence executed by the licensee *on his own land* is not countermandable (*f*). *Secus*, while it remains executory (*g*). But a licence from A. to B., to enjoy an easement *over the land of A.*; *e. g.* to enjoy the use of a drain (*h*) or a pew (*i*), or to come upon his land for any other purpose (*k*), is countermandable at any time, although it has been acted upon, or a valuable consideration paid for it, which has not been returned (*l*). Although a parol licence may be an excuse for a trespass, until such licence is countermanded; yet a right and title to have a passage for water over another's land, being a freehold interest (or rather being an incorporeal hereditament), requires a deed to create it (*m*). If the

(*y*) *Roberts v. Read*, 16 East, 215.

(*z*) *Bonomiv. Backhouse*, 9 H. L. Cas. 503.

(*a*) *Doe v. Harvey*, 8 Bingh. 239.

(*b*) *Warren v. Webb*, 1 Taunt. 379.

(*c*) *Mersey and Irwell Navigation v. Douglas*, 2 East, 497.

(*d*) *Salmon v. Bensley*, Ry. & M. 189.

(*e*) *Winter v. Brockwell*, 8 East, 308.

(*f*) See *Liggins v. Inge*, 7 Bingh. 682.

(*g*) *Per Haughton, J., Webb v. Paternoster*, Poph. 151.

(*h*) *Coeker v. Cowper*, 1 C. M. & R. 418.

(*i*) *Adams v. Andrews*, 15 Q. B. 284.

(*k*) See *Roffey v. Henderson*, 17 Q. B. 574.

(*l*) *Wood v. Leadbitter*, 13 M. & W. 838.

(*m*) *Hewlins v. Shippam*, 5 B. & C. 221.

licensor part with the property, the licence is *ipso facto* determined (*n*). The licence must be established by clear and satisfactory proof (*o*).

An authority, however, or licence coupled with an interest, cannot be revoked (*p*). Goods, which were upon the plaintiff's land, were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods; it was held, that after the sale the plaintiff could not countermand the licence (*q*): for it was part of the very contract, and as to the goods, operated as a grant (*r*). But a licence is not implied by law for the purchaser of goods sold under an execution or distress, to enter upon the premises of the former owner of them, and take them, although they have remained there with his assent (*s*).

V. Damages.

Damages.—In actions by reversioners, the true measure of damages is, not the diminution of the saleable value of the premises, although the nuisance may be of a permanent character, but such damages as the jury think sufficient to compel the defendant to abate the nuisance (*t*). The ground of the above decision, *viz.* that every continuance of a nuisance is a fresh nuisance, for which a fresh action will lie, applies, it will be observed, to actions by others than reversioners.

(*n*) *Wallis v. Harrison*, 4 M. & W. 544; *Coleman v. Foster*, 1 H. & N. 37.

(*o*) *Per Patteson, J., Blanchard v. Bridges*, 4 A. & E. 195.

(*p*) *Gaussen v. Morton*, 10 B. & C. 731. See *Smart v. Sandars*, 5 C. B. 917.

(*q*) *Wood v. Manley*, 11 A. & E. 34. See *Salter v. Woollams*, 2 M. & G. 650.

(*r*) See *per Jervis, C. J., Taplin v. Florence*, 10 C. B. 763.

(*s*) *Williams v. Morris*, 8 M. & W. 488.

(*t*) *Battishill v. Reed*, 18 C. B. 696.

CHAPTER XXXI.

PARTNERS.

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I. *What is necessary to constitute a Partnership.*

IN order to constitute a complete partnership, as well between the parties as in respect to strangers who may deal with them, a communion of participation of profits and loss is essential (a). The shares of the parties must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. A., for himself and his two partners (who were general merchants), B., for himself and partner (who were oil-merchants), C., for himself and son (who were also oil-merchants), agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. A. was to be the ostensible buyer, and the others were to share in his purchase, at the same price which he might give. A. and Co. were to have a half, B. and Co. a quarter, and C. and Co. the remaining quarter. In pursuance of this agreement, A. and Co. ordered a broker to buy quantities of oil. The broker accordingly bought several ship-loads, and among the rest a ship-load from the plaintiffs. To some of the vendors, (not plaintiffs in this action,) B. and Co., and C. and Co., during the treaty, declared it to be a common concern between them and A. and Co.; but, with respect to the plaintiffs, the purchase was made in the name of A. and Co. only, without any notice that the other defendants had any concern in it. The majority of the court, *viz.* *Heath, J., Gould, J., and Lord Loughborough, C. J.*, were of opinion that B. and Co. and C. and Co. were not to be considered as partners with A. and Co., on the ground that there was no communion of profit and loss. Each party was to have a

(a) A distinction must be observed between an actual partnership, and those cases in which there is only an inchoate right of partnership, which may or may

not be completed at the option of the intended partners. See *Fox v. Frith*, 10 M. & W. 131; and *Gabriel v. Evill*, 9 M. & W. 298.

distinct share of the whole ; the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one might be more or less than that of the other (*b*). So where A., B. and C. agreed that each should furnish 3,000*l.* worth of goods to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments, it was held, that this did not constitute a partnership between the three so as to make B. and C. responsible for goods bought by A. to furnish his quota of the cargo (*c*). So a member of a provisional committee of an intended railway company has been held not to be liable for contracts entered into, without his assent or authority, by other members of the committee, upon the ground that the intended association did not amount to a partnership, there being no communion of profit and loss (*d*). But in such a case it is a question for the jury whether the defendant authorized the company's solicitor, or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company, and on its behalf ; and then whether the credit was given on the faith of his being so personally responsible (*e*).

Where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter ; it was held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt ; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves (*f*).

A father, established in business, on his son's coming of age, told him he should have a *share* in it, and held him out to the world as his partner : the son acted as such for several years, but the particular share which the son was to have, was not settled : it was held, that as there was a partnership as between the parties and the rest of the world, the presumption of law was, that they were partners *inter se* ; that this presumption not having been repelled, the son, though not entitled to a moiety, was entitled to a *share* of profits ; but it was left to the jury to consider what was a fair and just proportion for the father to give, and the son to expect : the jury found that the son was entitled to a fourth part

(*b*) *Coope and others v. Eyre and others*, 1 H. Bl. 37.

(*c*) *Heap v. Dobson*, 15 C. B. (N. S.) 460.

(*d*) *Reynell v. Lewis*, 15 M. & W. 517. See also *Bright v. Hutton*, 3 H. L. Cas. 241.

(*e*) *Baillie v. Macaulay*, 13 Q. B. 815 ; 19 L. J., Q. B. 73 ; *Higgins v. Hopkins*, 3 Ex. 163 ; 18 L. J., Ex. 113 ; *Landman v. Entwistle*, 7 Ex. 632 ; 21 L. J., Ex. 208.

(*f*) *Wightman v. Townroe*, 1 M. & S. 412.

of the profits (*g*). Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one; it was held, that it was his duty to notify his disaffirmance of the partnership on arriving at the age of twenty-one; and, as he had neglected to do so, that he was responsible to persons who had trusted I. S. with goods subsequently to the infant's attaining twenty-one, on the credit of the partnership (*h*).

In respect of creditors, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise; upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. "Traders," said *Tindal*, C. J., "become partners between themselves by a mutual participation of profit and loss; but as to third persons they are partners if they share the profits of a concern; for he who receives a share of the profits receives a part of that fund upon which the creditors of the concern have a right to rely for payment; and is, therefore, to be made liable to losses although he may have expressly stipulated for exemption from them" (*i*).

The whole doctrine of partnership has been placed upon a new footing by the decision of the House of Lords in the case of *Cox v. Hickman*. That tribunal has in effect decided that the proper test of liability as a partner, is not whether the party sought to be charged has stipulated for a participation in profits as such, but whether the person by whom the trade was actually carried on, carried it on in the capacity of agent for him. S. and S. trading in that name, becoming embarrassed, executed a deed to which they were parties of the first part; certain of the creditors as trustees of the second part; and the general scheduled creditors (among whom the trustees were named) of the third part. The deed empowered the trustees to carry on the business under the name of the "Stanton Iron Company," to execute all contracts and instruments necessary to carry it on; to divide the net income to be taken among the creditors in rateable proportions (such income to be deemed the property of S. and S.), with power to the majority of the creditors assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred to S. and S. Two of the creditors, C. and W., were named among the trustees. C. never acted. W. acted for six weeks, and then resigned. Some time afterwards, the other trustees, who continued to carry on the business, became indebted to H., and gave him bills of exchange, accepted by themselves,

(*g*) *Peacock v. Peacock*, 2 Campb. 45; but see *Andrews v. Pugh*, 24 L. J., Chan. 58.

(*h*) *Goode and Bennion v. Harrison*, 5 B. & A. 147.

(*i*) *Pott v. Eylon*, 3 C. B. 39.

"per proc. the Stanton Iron Company." It was held, by the House of Lords (reversing the decision of the courts below), that there was no partnership created by the deed, and that consequently, C. and W. could not be sued on the bills as partners in the company, and further that they could not be sued for goods sold and delivered, there being no distinction upon the question of liability between the bills and the consideration for which they were given. "The mere concurrence of creditors in an arrangement under which they permit their debtor or trustees for their debtor to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors," *Per Lord Cranworth*. "The law as to partnership is a branch of the law of principal and agent. A partner embraces both characters; and when a man orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all profits to him, he is the principal, and the person so employed is the agent; and the principal is liable for the agent's contract. So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent of the other, and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence, it becomes a test of the liability of one for the contracts of another, that he is to receive the whole or a part of the profits arising from that contract, by virtue of the agreement made at the time of the employment. I believe this is the true test of partnership liability. Perhaps the maxim, that he who partakes the advantage ought to bear the loss, often stated in the earlier cases, is only the consequence, not the cause, why a man is made liable as a partner." *Per Lord Wensleydale (k)*. The cases anterior to *Cox v. Hickman* must therefore be taken with the modification introduced by that case, and by the statute 28 & 29 Vict. c. 86.

A. and B., ship-agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. It was, however, expressly stipulated between A. and B., that they were not to be answerable for each other's losses. It was held, that although, with respect to each other, these persons were not to be considered as partners under this agreement, yet they had made themselves such with regard to all persons with whom either contracted as ship-agent (l). The

(k) *Cox v. Hickman*, 8 H. L. Cas. 269; 9 C. B. (N. S.) 47; 30 L. J., C. P. 125, in Dom. Proc. The Exchequer Chamber were equally divided upon the question. See also *Re English and Irish Church Assurance Society*, 1 H. & M. 85;

and *Kilshaw v. Jukes*, 3 B. & S. 847; and *Bullen v. Sharp*, L. Rep. 1, C. P. 86, in error; 35 L. J., C. P. 105.

(l) *Waugh v. Carver*, 2 H. Bl. 235; *Heyhoe v. Burge*, 9 C. B. 431; 19 L. J., C. P. 243.

distinction taken in the preceding case as to an agreement not constituting a partnership as between the parties themselves, though it may have that effect, *quoad* third parties, was recognized in the following case:—A., having neither money nor credit, offered to B., that if he would order with him certain goods to be shipped upon an adventure, if *any profit should arise from them, B. should have half for his trouble*: B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone; it was held that B. was entitled to recover back such payment in assumption against A., who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. was liable as a partner to third persons, creditors (*m*). But where two persons, who have never been in partnership as general partners, concur in giving an order for an undivided parcel of goods, they are not, therefore, liable jointly to the seller, if, upon the whole of the transaction, the intention of the parties appears to have been that the buyers should be severally responsible for the amount of their respective interests in the goods (*n*).

A party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit (*o*). But in an action for goods and work applied in *equipping a mine* (the defendant being charged as one of the company *concerned in working it*) it was held, that the mere payment of deposits without any signature of a deed, or interference in management, was not enough to make the defendant liable, unless the jury believed, from the evidence, that an actual conveyance of an interest in the mine had been made to her (*p*). Where, however, a defendant (*q*) was charged with a debt as partner in a mining company, it was held, that the fact of partnership might be shown by evidence short of strict proof that he had executed a deed of co-partnership, or was legally interested in the mine; and that declarations made by him, either before or after the debt was incurred, might be used for this purpose (*q*). So it was held to be sufficient evidence to prove a person to be a member of a trading company, that he and others had agreed to form a company, and that the business had been carried on upon the footing of that agreement (*r*). *Maule, J.*, in

(*m*) *Hezeketh v. Blanchard*, 4 East, 144. See also, on this point, *Rawlinson v. Clarke*, 15 M. & W. 592; and *Caldicott v. Griffiths*, 8 Ex. 898.

(*n*) *Gibson v. Lupton and Wood*, 9 Bingham, 297.

(*o*) *Lawler v. Kershaw*, 1 M. & Malk. 93.

(*p*) *Vice v. Lady Anson*, 1 M. & Malk. 96; 7 B. & C. 409. In *Steigenberger v. Carr*, 3 Scott's N. R. 471; 3 M. & Gr.

191; *Tindal, C. J.*, says, "with respect to this case of *Vice v. Lady Anson*, I cannot think its doctrine will ever be extended: and certainly none of the subsequent cases place much reliance upon it."

(*q*) *Ralph v. Harvey*, and *Richards v. Harvey*, 1 Q. B. 845.

(*r*) *Owen v. Van Uster*, 20 L. J., C. P. 61. See also, upon this point, *Thomas v. Clarke*, 18 C. B. 662; 25 L. J., C. P. 309.

his judgment, thus explains the case of *Vice v. Anson*:—"In order to make Lady Anson liable it was necessary to prove that she was the person in whose behalf the expenses which were the subject of the action had been incurred. The proof relied upon was, that Lady Anson had said that she was a shareholder; but that was disposed of by showing that she made that admission under the false impression that she had a legal interest in the mine. That case by no means decides that persons cannot be shareholders in a mine except by having a legal interest in it. It only shows, that if there be no other way of proving a person to be a shareholder than by proving that he had a legal interest, that interest must be properly proved."

Where a mining company was formed, the capital to be 30,000*l.*, in 3000 shares of 10*l.* each, and 2000 shares only were actually subscribed for, of which the defendant took 100; it was held, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines on the order of the directors (s). A project having been formed for the establishment of a company for the manufacturing of sugar from beet-root, a prospectus was issued, stating the proposed capital to consist of 10,000 shares of 25*l.* each. The directors began their works, and entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1,400 out of the 10,000 shares were taken; it was held, that a subscriber, who had taken shares, and paid a deposit on them, was not liable upon such contracts of the directors without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorized the making of the contract (t). The agreement to take shares in a concern which is to have a certain amount of capital is a conditional contract; that is, provided that that amount of capital is subscribed for, and unless that condition is waived the subscriber is not a shareholder in the sense of a person having agreed to take shares (u).

Where it was proved that A. had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built; it was held, that he was liable in an action for work done in building those houses, without proof that he had any actual interest in

(s) *Tredwen v. Bourne*, 6 M. & W. 461. See *Dickenson v. Valpy*, 10 B. & C. 128; *Hawken v. Bourne*, 8 M. & W. 703; and *Peel v. Thomas*, 15 C. B. 714; 24 L. J., C. P. 86; and see *ante*, p.

1089.

(t) *Pitchford v. Davis*, 5 M. & W. 2.
(u) See *Galvanized Iron Company v. Westoby*, 8 Ex. 17; 21 L. J., Ex. 302.

them, or in the land on which they were built (*v*). A merchant in London recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses; it was held, that this was a participation in profit, and constituted a partnership between the parties *quoad hoc* (*x*). In 1820, W. advanced to A. and B., then carrying on business in partnership as brewers, the sum of 24,000*l.*, and the three executed a deed, by the terms of which a partnership stock was created, in which they all had a joint property: W., however, was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2,000*l.* or 2,400*l.* a-year, as the case might be, out of the clear profits: W.'s name never appeared to the world as a partner; it was held, that W. was a partner; and the new firm having become bankrupt in 1826, that the creditors of the old firm and the creditors of the new firm were both entitled to prove against the property of the new firm (*y*).

A., B., and C., the proprietors of a stage-coach, dividing the general profits of the concern, agreed that they should each work the coach a stage with horses, their separate property, and maintained respectively at their separate expense; it was held, that B. and C. were not jointly liable as co-partners with A. for the price of hay furnished at A.'s request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him under the agreement (*z*). *Note*.—It did not appear in what manner, upon an adjustment of the accounts, the hay furnished to the different horses was paid for; whether as part of the general outgoings or separately by each party. Where A., the keeper of a coach-office, and a part owner in several coaches, made a contract with B. for the carriage of parcels which he was in the habit of sending from that office to various places; it was held, that this bound the owners of all the coaches, in which A. was part owner, and as well those who became part owners after making the contract as those who were so before (*a*). A. was employed by B. to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum; this was held not to constitute a partnership between A. and B. as to these goods (*b*). So where A., having purchased two bullocks, put them to depasture upon the lands of B., under an agreement that, after they had been

(*v*) *Braithwaite v. Skafeld*, 9 B. & C. 401.

(*x*) *Cheap v. Barclay*, 4 B. & A. 663.

(*y*) *Exp. Chuck*, 8 Bingh. 469; *coram* Lord Chancellor, assisted by *Tindal*, C. J., and *Littledale*, J.

(*z*) *Barton v. Hanson and others*, 2

Taunt. 49. See, *per Parke*, B., an explanation of the principle on which this and similar cases proceeded in *Wilson v. Whitehead*, 10 M. & W. 503, 504.

(*a*) *Helsby v. Mears*, 5 B. & C. 504.

(*b*) *Benjamin v. Porteus*, 2 H. Bl. 590; *Pott v. Eyton*, 3 C. B. 32.

fatted, the profit to be made upon the re-sale, above a certain sum (at which A. then valued the bullocks), should be equally divided between A. and B. It was held, that A. and B. were merely partners in the profits, and that this was a mode of paying B. for the pasture; consequently A. might maintain an action in his own name, without joining B., to recover the price of the bullocks from a person to whom he had sold them (*c*). So where there was an agreement between A., the sole owner of a lighter, and B., a lighterman, that B., in consideration of working the lighter, should have half her *gross earnings*, Lord *Ellenborough* was of opinion, that as this was only a mode of paying B. wages for his labour, and differed from a participation of profits and loss, it did not constitute a partnership (*d*). So where A. and S. were joint owners of a ship, and A. worked the ship, defraying all the expenses, and taking the entire management, and he took two thirds of the gross earnings, and S., who did nothing, took the other third; it was held, that the result of these facts was, that A. hired the share of S. in the ship, and that he was not the partner or agent of S., so as to render S. liable in an action caused by the negligence of A., but it was doubted whether the same rule would apply in an action *ex contractu* (*e*). So an agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods (*f*). A partnership cannot acquire property in goods obtained by the fraud of one of the partners to which the rest are not privy (*g*). Where a chattel has been purchased by a partner for himself, and he has paid for it out of the partnership assets, the firm has no interest in it nor any lien upon it for the amount of the purchase-money (*h*). An agreement to carry on a partnership in violation of an act of parliament is void, and will confer no rights on either party against the other (*i*).

The 28 & 29 Vict. c. 86, after reciting that it is expedient to amend the law relating to partnership, enacts as follows:—

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.
2. No contract for the remuneration of a servant or agent of

(*c*) *Wish v. Small*, Devon Spring Assizes, 1808, *coram Thomson*, B., 1 Campb. 331. See *French v. Styring*, 26 L. J., C. P. 181.

(*d*) *Dry v. Boswell*, 1 Campb. 329. See also *R. v. Wortley*, 21 L. J., M. C. 44.

(*e*) *Barnard v. Aaron*, 31 L. J. C. B., 334.

(*f*) *Meyer v. Sharpe*, 5 Taunt. 74.

(*g*) *Kilby v. Wilson*, Ry. & Moo. 178.

(*h*) *Walton v. Butler*, 29 Beav. 428.

(*i*) *Armstrong v. Lewis*, 2 Cr. & M. 298.

any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

3. No person, being the widow or child of a deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to any liabilities incurred by such trader.
4. No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt be deemed to be a partner of, or be subject to the liabilities of the person carrying on such business.
5. In the case of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any vendor of any goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.
6. In the construction of this act, the word "person" shall include a partnership firm, a joint-stock company, and a corporation.

By 7 Will. IV. & 1 Vict. c. 73., the Queen is enabled to confer certain powers and immunities on trading and other companies by patent: *inter alia*, 1. The same powers may be granted to companies not incorporated as if they were so (*k*). 2. That suits may be carried on in the name of one of the officers (*l*). 3. The individual liability of members may be limited (*m*). 4. The evidence of any officer or member of such company is made admissible.

Joint stock companies are regulated by the Joint Stock Companies Act, 1862. 25 & 26 Vict. c. 89.

(*k*) Sect. 2.

(*l*) Sect. 3. See *Galloway v. Bleaden*,

1 M. & Gr. 247; 1 Scott, N. R. 170.

(*m*) Sect. 4.

II. *How far the Acts of one Partner are binding on his Co-Partners.*

A general partnership agreement (*n*), though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose; and the power must be given by deed, for one man cannot authorize another to execute a deed for him but by deed; and no subsequent acknowledgment will suffice (*o*). But although one partner cannot bind the other partners *by deed*, without an authority by deed, yet the law implies an authority in the individual members of every copartnership to enter into such contracts on behalf of the firm, as are usually entered into in the course of such a business (*p*). Thus in mercantile transactions, one member of a partnership in trade may bind his co-partners even without their knowledge or assent, by bills of exchange and promissory notes (*q*), in the name of the partnership (*r*); for this is warranted by the custom and law of merchants, and is necessary for the purposes of trade. But these reasons do not apply to the case of partnerships not in trade, such as a firm of solicitors; and therefore in such cases the individual partners have no implied authority to bind the firm by negotiable instruments (*s*).

The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority (*t*); and consequently that implication may be rebutted: for it is not essential to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others. But any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the other is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made (*u*). A new partner, however, cannot be bound for an old debt incurred by the

(*n*) *Harrison v. Jackson and others*, 7 T. R. 207.

(*o*) *Steiglitz v. Eggington*, Holt's N. P. C. 141.

(*p*) *Beckham v. Drake*, 9 M. & W. 79.

(*q*) *Ante*, tit. "Bills of Exchange," p. 264.

(*r*) *Kirk v. Blurton*, 9 M. & W. 284; *MacLae v. Sutherland*, 3 E. & B. 1; *Forbes v. Marshall*, 11 Ex. 116; *ante*,

p. 265.

(*s*) *Hedley v. Bainbridge*, 3 Q. B. 316. See also *Harman v. Johnson*, 2 E. & B. 61; *S. C.* 22 L. J., Q. B. 297; *Yates v. Dalton*, 28 L. J., 69 Ex.

(*t*) *Gallway v. Mathew and another*, 10 East, 264.

(*u*) *Per Parke, B.*, delivering judgment of court in *Hawken v. Bourne*, 8 M. & W. 703.

other partners, before the new partner was taken into the firm; nor can one partner pledge the security of another for his own private debt (*x*). Therefore where a bill had been accepted in the name of a firm for a debt which was incurred partly before and partly after A. had joined it,—it was held that A. was liable for that portion of the debt only which was incurred after he had joined (*y*).

One partner may, by procuration, indorse bills for the firm (*z*). A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership (*a*). A bill of exchange duly drawn by a partnership, and accepted during the continuance of the partnership, continues to be the joint property of the firm, notwithstanding a dissolution of partnership, and may therefore be endorsed after the dissolution by any of the partners in the name of the firm, although the indorsee has notice of the dissolution (*b*).

One of several persons cannot bind the others by a submission to arbitration, even of matters arising out of the business of the firm (*c*), and in this respect there is not any distinction between a general partnership, and a partnership in a particular transaction (*d*); nor can one partner, by giving a guarantee in the name of the firm, bind the others in the absence of evidence that it was the practice of the firm to give guarantees (*e*), or that it was necessary for the purpose of carrying on the partnership, or that the other partners had adopted it (*f*). Nor is there any implied authority to one adventurer from his co-adventurers in a mine, to pledge their credit for money borrowed by him for the purposes of the mine (*g*).

If one of two partners commit a secret act of bankruptcy, the other partner may, for a valuable consideration, and without fraud, dispose of the partnership effects; and though he himself afterwards become bankrupt, the assignees, under a joint commission, cannot maintain trover against the *bonâ fide* vendee of such partnership effects; and the same rule holds, although the solvent partner knew of the bankruptcy (*h*). Hence, where one of two partners, who were country bankers, became bankrupt; and the defendants being holders of their notes, obtained payment of part of them from the London banker, at whose house they were payable out of the funds in their hands belonging to the country bank; and the solvent

(*x*) *Sheriff v. Wilks*, 1 East, 48. See also *Vere v. Ashby*, 10 B. & C. 288; and *Beale v. Moults*, 10 Q. B. 976, 983.

(*y*) *Wilson v. Lewis*, 2 M. & G. 197. See also *Norton v. Seymour*, 3 C. B. 792; and *Craufurd v. Cocks*, 6 Ex. 291.

(*z*) *Williamson v. Johnson*, 1 B. & C. 146.

(*a*) *Smith v. Winter*, 4 M. & W. 454.

(*b*) *Lewis v. Reilly*, 1 Q. B. 342.

(*c*) *Steed v. Salt*, 3 Bingh. 101.

(*d*) *Adams v. Bankart*, 1 C. M. & R. 681. See also *Hatton v. Royle*, 27 L. J., Ex. 486.

(*e*) *Hasleham v. Young*, 5 Q. B. 833.

(*f*) *Ricketts v. Bennett*, 4 C. B. 686; *S. C.* 17 L. J., C. P. 17.

(*g*) *Brettell v. Williams*, 3 Ex. 623; 19 L. J., Ex. 121.

(*h*) *Fox v. Hanbury*, Cowp. 449.

partner knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to defendants in payment of the residue of the notes in their hands, and afterwards became bankrupt; it was held, that the assignees, under a joint commission, could not recover from the defendants the monies so paid to them by the London bankers, nor the proceeds of the said bill (*i*). If one partner becomes a bankrupt, his assignees cannot obtain any share of the partnership effects, until they first satisfy all that is due from him to the partnership (*k*). A solvent partner may sue out a writ in the name of his partner, or of his assignees, if he is bankrupt, as well as his own, in order to recover a debt due to the partnership; but the partner who objects has a right to be indemnified against the costs (*l*).

Where one partner commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any power over the partnership property. And any disposition of it by him is void as against the other partners, it being vested in them and his assignees by relation to his act of bankruptcy (*m*). Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered as a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties (*n*).

Where goods were ordered by one member of a club for the benefit of all, it was held, that every member, who either concurred in the order or subsequently assented to it, was liable, although the member who ordered the goods was made the debtor in the plaintiff's books, and the bill was sent to him, unless it clearly appeared that the plaintiff meant to give credit to that member only (*o*). But in a later case, where a club was formed subject to the following among other rules, *viz.* that the entrance-fee should be ten guineas, and the annual subscription five guineas; that if the subscription were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily; the steward being authorized, in default of payment on request, to refuse to continue to supply them: it was

(*i*) *Harvey v. Crickett*, 5 M. & S. 336.
See *Woodbridge v. Swann*, 4 B. & Ad. 636.

(*k*) *Per Tenterden, C. J., Holderness v. Shackels*, 8 B. & C. 618.

(*l*) *Whitehead v. Hughes*, 2 Cr. & M. 318.

(*m*) *Per Bayley, B., in Burt v. Moult*, 3 Tyrw. 569, recognizing *Thomason v. Frere*, 10 East, 418.

(*n*) *Bond v. Gibson and another*, 1 Campb. 185.

(*o*) *DeLauney v. Strickland*, 2 Stark. N. P. C. 416, *Abbott, C. J.*

held, that a member of the club, merely as such, was not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for that the committee had no authority to pledge the personal credit of the members (*p*).

A judgment taken by one of two joint creditors does not extinguish the debt, unless it be taken with the concurrence of both (*q*).

A., B. and C. carried on trade in partnership, and A. was also in partnership with D. A. being indebted to the firm of A., B. and C. before the dissolution of that partnership, unknown to D., indorsed a bill and paid over money (belonging to A. and D.) in discharge of the private debt due from A. to A., B. and C., and immediately afterwards indorsed the same bill to a creditor of the firm of A., B., and C. The partnership between A., B. and C. having been dissolved; it was held, that A. and D. could not maintain trover against B. and C. for the bill nor assumpsit for the money paid by A. out of the funds of A. and D. to A., B. and C., in discharge of his private debt: and A. and D. having afterwards become bankrupts; it was held, that their assignees could not maintain such action (*r*). The principle of this decision was, that if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act (*s*). So where, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash, and a set-off of a debt due from that one to the defendant; it was held, that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement (*t*).

One of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who had discounted other bills drawn in the partnership firm with the same banker; it was held, that the banker had not any remedy against the *partnership*, upon the bill so drawn by the single partner, because they did not appear to have been drawn for and on account of the partnership. And although the proceeds of these bills had been applied to the use of the partnership, yet the court held, that the partners were not liable as for money lent, inasmuch as the transaction was originally mere matter of discount, and not an advance of money to the partnership, taking the bills as a collateral security (*u*). But where one

(*p*) *Fleming v. Hector*, 2 M. & W. 172, recognized in *Todd v. Emly*, 7 M. & W. 427; *S. C.* 8 M. & W. 505. See also *Tyrrell v. Woolley*, 2 Scott's N. R. 171; 1 M. & Gr. 809, case of a Benefit Society.

(*q*) *Per Holroyd, J.*, in *Biggs v. Felows*, 8 B. & C. 405.

(*r*) *Jones v. Yates*, 9 B. & C. 532.

(*s*) *Per Parke, B.*, in *Wallace v. Kelsall*, 7 M. & W. 273.

(*t*) *Wallace v. Kelsall*, 7 M. & W. 264, recognized in *Turner v. Hardey*, 9 M. & W. 770; and in *Gordon v. Ellis*, 7 M. & G. 607; 8 Scott, N. R. 290.

(*u*) *Emly v. Lye*, 15 East, 7.

of several partners, with the privity of the others, draws bills of exchange in his own name upon the partnership firm in favour of persons who have advanced him the amount, which he applies to the use of the partnership, although the partners are not jointly liable on the bills, they may be jointly sued by the payees for money lent (*x*). Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills; it was held, that the separate notes, having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt (*y*). Payment to one of two partners of a partnership debt, after they have appointed a third person to collect the debts, and with notice of such appointment, is, notwithstanding the notice, good (*z*). Where one of two partners makes a contract, as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, yet if the business is afterwards transacted by or with the knowledge of the other partner, he is bound by the contract made by his partner (*a*). So a pledge by one partner of partnership property will bind his partners, although the pledge is made without their privity and consent; provided there be not any fraud, and provided also the pledgee did not know, nor had means of knowing, that the property was partnership property (*b*). Mere knowledge by a creditor of the dissolution of partnership will not release the old partners from their liability to him, though he continue his account with the new firm, unless he appears expressly or by some act to have accepted the substituted credit of the new partnership, instead of the retiring partners (*c*).

III. *Of Actions by and against Partners, and of Remedies against each other.*

Whenever an express contract is made, an action is maintainable upon it either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made. Hence, where three parties agreed to be jointly in-

(*x*) *Denton v. Rodie*, 3 Campb. 493.

(*y*) *Bedford v. Deakin*, 2 B. & A. 210.

(*z*) *Porter v. Taylor*, 6 M. & S. 156.

(*a*) *Sandilands v. Marsh*, 2 B. & A.

673.

(*b*) *Raba v. Ryland*, per Dallas, C. J., confirmed by court, Gow, N. P. C. 132.

(*c*) *Kirwan v. Kirwan*, 2 Cr. & M. 617. See *Blew v. Wyatt*, 5 C. & P. 397.

terested in goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly; it was held, that all might join in suing the vendor for a breach of that contract (*d*). A contract was made by one of several partners in his individual capacity, he declaring at the time that the subject-matter was his property alone; it was held, that his declaration was evidence of the fact against all the partners, and therefore that they could not sue jointly upon such a contract (*e*). The defendant agreed with Sharpe, a coachmaker, for the hire of a carriage for five years. The defendant did not know that Sharpe had a partner, but in fact Robson was partner with Sharpe at the time of the contract. At the end of three years there was a dissolution of partnership between Sharpe and Robson, and notice of that dissolution, and of Sharpe having assigned all his interest in the contract to Robson, was given to the defendant, who said he would not continue the contract with Robson. It was held, that it was competent to the defendant to consider the agreement as at an end; for he might have been induced to enter into the contract by reason of the confidence he reposed in Sharpe; and at all events was entitled to his services in the execution of it (*f*).

If a person colludes with one partner in a firm, in order to enable him to injure the other partners, they can maintain a joint action against the person so colluding (*g*).

F., a partner in a banking-house, transferred stock out of the name of K. in the books of the Bank of England, under a forged power of attorney, and without the authority of K., and caused the produce to be mixed with the money of the firm. F. having been convicted of another forgery committed under similar circumstances, and executed; it was held, that K. might recover the amount against the surviving partners in an action for money had and received (*h*).

An action of assumpsit may be maintained by the several partners of a firm, upon the guarantee given to one of them if there be evidence that it was given for the benefit of all (*i*). It will be observed, that in that case the guarantee was not by deed. Covenant lies on a deed of composition with creditors by one of two partners who signs the deed in the name of the firm and sets his seal thereto, for non-payment of an instalment due on a partnership debt; for the other partner not being a party to the deed, cannot join in covenant (*k*). In an action *by* partners for the non-performance of a contract entered into with the partnership, the action

(*d*) *Cothay v. Fennell*, 10 B. & C. 671.

(*e*) *Lucas v. De la Cour*, 1 M. & S. 249.

(*f*) *Robson and Sharpe v. Drummond*, 2 B. & Ad. 303.

(*g*) *Per Lord Tenterden*, C. J., in *Long-*

man v. Pole, 1 M. & Malk. 225.

(*h*) *Marsh and others v. Keating*, 1 B. N. C. 198.

(*i*) *Garrett v. Handley*, 4 B. & C. 664. See *Walton v. Dodson*, 3 C. & P. 163.

(*k*) *Metcalfe v. Rycroft*, 6 M. & S. 75.

should be brought in the joint names of all the persons of whom the partnership consisted at the time the contract was made. But where an action was brought by Mawman, a bookseller, against Gillett, the printer, for not insuring the "Travels of Anacharsis:" and it appeared that several other booksellers, and amongst them Evans, a witness, had a share in the work: but inasmuch as Evans had never contracted with Gillett, but Mawman was the only ostensible man; the court held, that he was the only proper plaintiff (*l*);—and with good reason, for the only acting partner might owe much money to the defendant, which the defendant might set off; but if the plaintiff and the dormant partner had sued, that debt of the acting partner could not be set off. "There is a material distinction between the case where partners are defendants, and where partners are plaintiffs; if you can find out a dormant partner, defendant, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication in your contract shall not sue you." Where, however, a merchant, carrying on trade on his own separate account, introduced into his firm the name of a clerk, who did not partake in the profits of the business, but continued to receive a fixed salary; Lord *Ellenborough* held, that in an action on a bill of exchange, payable to the order of this firm, the clerk ought to have been joined as a plaintiff, for he was to be considered, in all respects, as a partner as between himself and the rest of the world; that where the name of the real person is introduced with his own consent, it is immaterial what agreement there may be between him and those who share the profit and loss—they are equally responsible, and the contract of one is the contract of all (*m*). An ostensible partner, who makes a contract, may, if he pleases, join dormant partners with himself as plaintiffs (*n*). But a party with whom the contract is actually made, may sue without joining others with whom it is apparently made (*o*). Where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon condition that the drawer should provide for the same when due: it was held, that all the partners could not recover on the bill (*p*).

The liability of the partners depends upon their being partners at the time when the contract is made, and a dormant partner cannot set up the plaintiff's ignorance of his being a partner, to obviate such liability (*q*). And no distinction can be drawn in this respect between contracts by parol or implied contracts, and express

(*l*) *Mawman v. Gillett*, cited by Sir James Mansfield, C. J., 2 Taunt. 325. See further on this point *Robson v. Drummond*, 2 B. & Ad. 303.

(*m*) *Guidon v. Robson*, 2 Campb. 302.

(*n*) *Skinner v. Stocks*, 4 B. & A. 437.

(*o*) *Kell v. Nainby*, 10 B. & C. 20.

(*p*) *Sparrow and others v. Chisman*, 9 B. & C. 241, recognized in *Gordon v. Ellis*, 7 M. & G. 607; 8 Scott, N. R. 290. See also *Driver v. Burton*, 21 L. J., Q. B. 157.

(*q*) See Lord Kenyon's opinion in *Saville v. Robertson*, 4 T. R. 725.

contracts in writing not under seal; an undisclosed principal or dormant partner is equally liable to be sued thereon (*r*). But in a case where there was a stipulation between three persons who appeared to the world as partners, that one of them should not participate in the profit and loss, and should not be liable as a partner; it was held, that he was not liable as such to persons who had notice of this stipulation (*s*).

It is a general rule, that, between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. Hence, where A. and B. jointly undertook to procure a cargo for a vessel, for certain commission, which they agreed to divide equally between themselves; and B. made all disbursements and received all the monies for the owners, who objected to money claimed by B. for commission; it was held, that A. could not maintain money had and received against B. for his share of the commission, the demand arising out of a partnership transaction, and no account having been settled; and the circumstance of all the monies having been received and paid by one partner made no difference (*t*). But where A. and B. had been partners in certain transactions for the sale and purchase of wool, having also had other dealings together; and they settled a general account, in which was an item to B.'s debit "to loss on wool," and which showed a balance against him; and B. signed the account and admitted the balance due; it was held, that A. might afterwards maintain an action to recover the amount of the item for the loss on the wool (*u*).

A number of persons associating together and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway are partners in the undertaking; and, therefore, a subscriber who acted as their surveyor cannot maintain an action for work done by him in that character on account of the partnership against all or any one of the other subscribers (*x*). Shareholders in a cost-book mining company cannot by agreement among themselves, "that calls in arrear shall be considered to be debts due from defaulting shareholders to the purser," empower him to recover such calls from such shareholders in an action at law (*y*). But where the plaintiff, on the 24th of October, entered into an express contract with a committee of individuals, associated together for the purpose of obtaining an act of parliament for making a turnpike-road, to do certain work for a specified sum; and on the 14th of November the plaintiff caused his name to be inserted in the list of subscribers for two shares; it was held, that the circumstance of his becoming a partner did not affect his right to

(*r*) *Beckham v. Drake*, 9 M. & W. 79; S. C. (in error), 11 M. & W. 315.

(*s*) *Alderson v. Pope*, 1 Campb. 404, n.

(*t*) *Bovill v. Hammond*, 6 B. & C. 149.

(*u*) *Wray v. Milcstone*, 5 M. & W. 21.

(*x*) *Holmes v. Higgins*, 1 B. & C. 74; *Wilson v. Curzon*, 15 M. & W. 532. See *Boulter v. Peptow*, 9 C. B. 493; 19 L. J., C. P. 191.

(*y*) *Hybart v. Parker*, 27 L. J., C. P. 120.

recover in respect of the express contract previously made; but that with respect to a sum which had been allowed by the jury for work contracted for after the 14th of November, the plaintiff, being then a partner, could not recover that, the case falling within the principle of *Holmes v. Higgins* (z). A society for the protection of trade is not a partnership so as to prevent a subscriber from suing members of the committee of the society for work done by their order (a). One partner cannot recover a sum of money received by the other; unless, on a balance struck, that sum be found to be due to him alone (b). A promissory note was given in the partnership name by one partner, A., for his own private debt, which the other partner, B., was compelled to pay; it was held, that B. might recover the amount from A. as money paid to his use (c). Where plaintiff and defendant had been engaged in running a coach from B. to L., plaintiff finding horses for one part of the road, defendant for another, and the profits of each party were calculated according to the number of miles covered by his own horses; the plaintiff received the fares, and rendered an account thereof every week to the defendant; it was held, that plaintiff and defendant were partners in this concern; and that, in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance which had been declared in his favour upon these weekly accounts; inasmuch as this was a balance during the continuance of the concern, and not a final balance upon all the partnership accounts (d).

The partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which took place while he was partner in both houses; whether the action be brought in the lifetime of the common partner or after his decease. But, after his decease, the surviving partners of the one house may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner (e). A., B., and C. were partners; A. retired from the firm, whereof notice was given to D., a creditor of the firm, who at the same time was informed that the business would be continued, as heretofore, by B. and C., the remaining partners, "who assume the funds, and charge themselves with the liquidation of the partnership." The balance due to D. was transferred to his credit by the new firm; and D. was informed of this transfer and assented to it. D. afterwards drew upon the new firm for a part of this balance, and they accepted and paid his bills. The new firm having become insol-

(z) *Lucas v. Beach*, 1 M. & Gr. 417;
1 Scott's N. R. 350.

(a) *Caldicott v. Griffiths*, 23 L. J.,
Ex. 54.

(b) *Per Buller, J.*, in *Smith v. Barrow*,
2 T. R. 478.

(c) *Cross v. Cheshire*, 7 Ex. 43; 21 L.
J., Ex. 3.

(d) *Fromont v. Coupland*, 2 Bingham.
172. See also *Carr v. Smith*, 5 Q. B.
128.

(e) *Bosanquet v. Wray*, 6 Taunt. 597.

vent; it was held, that A. continued liable for the debt due to D. from the old firm (*f*). But where S. and others carried on business under the name of the "*Plas Madoc Colliery Company*," S. withdrew from the firm, which *afterwards* became indebted to C., no notice having been given to C. or the public of S.'s withdrawing; it was held, that S. was not liable for the debt; for the name of the company did not give any information of the parties composing it, and there was not any sufficient evidence that S. had ever, while a partner, represented himself as such to C., or appeared so publicly in that character, that C. must have been presumed to know of it (*g*). Where a banking company makes payments professedly on behalf of a customer (who has a banking account with the firm), but without his authority, and the sum so paid is entered to his debit in the books of the firm, and the firm afterwards admits new partners, the new firm is not liable to the customer for such payments, unless there be an agreement between the two firms and the customer that the new firm shall take upon themselves the actual liabilities of the old firm (*h*).

By 1 & 2 Vict. c. 96, after reciting the 7 Geo. IV. c. 46, (An Act for the better regulating Co-partnerships of certain Bankers in England,) and 6 Geo. IV. c. 42, (Irish Act,) it is enacted, that any person now being, or having been, or who may hereafter be, or have been, a member of any co-partnership, carrying on, or which may hereafter carry on, the business of banking under the provisions of these acts, may, at any time during the continuance of this act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said co-partnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding at law or in equity against any public officer appointed or to be appointed under the provisions of the said acts, to sue and be sued on behalf of the said co-partnership; and any such public officer may in his own name commence and prosecute any action, &c., against any person being or having been a member of the said co-partnership, either alone or jointly with any other person, against whom any such co-partnership has or may have any demand; and that every person being or having been a member of any such co-partnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such co-partnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership; and that no action or suit shall in anywise be

(*f*) *David v. Ellice and others*, 5 B. & C. 196. But see remark of Parke, B., in *Kirwan v. Kirwan*, 2 Cr. & M. 624, and

Hart v. Alexander, 2 M. & W. 492.

(*g*) *Carter v. Whalley*, 1 B. & Ad. 11.

(*h*) *Crawford v. Cocks*, 6 Ex. 287.

affected by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may in anywise be interested or concerned in such action, being or having been a member of the said co-partnership; and that all such actions, &c., shall be conducted and have effect as if the same had been between strangers. (See *Seddon v. Connell*, 10 Sim. 58). And by sect. 2, in case the merits of any demand by or against any such co-partnership shall have been determined in any action or suit, by or against any such public officer, the proceedings in such action or suit may be pleaded in bar of any other action or suit by or against the public officer of the same co-partnership for the same demand. This act has been made perpetual by 5 & 6 Vict. c. 85. See also 7 & 8 Vict. c. 113, entitled, "An Act to regulate Joint-Stock Banks in England."

IV. Evidence.

Acts, subsequent to the time of delivering goods on a contract, may be admitted as evidence to show that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods), will make him liable in an action for goods sold and delivered, though he will be liable in an action on the bill of exchange (*i*). It is incumbent on persons dissolving a partnership to send notice of such dissolution to all the persons with whom they have had dealings in partnership. The *Gazette* of itself is not sufficient notice of such dissolution (*k*). It seems, however, that in respect of persons who had not any previous dealings with the partnership, an advertisement in the *Gazette* would be sufficient notice of the dissolution, so as to prevent such persons from recovering against the parties who constituted the firm originally, upon a security given by one of the parties in the name of the firm, after such notice of dissolution (*l*). Bankers ought, regularly, to give notice of a change in the firm, by a circular letter; but such change may also be notified by an alteration of the name in the printed cheque; and persons who have used the new cheques cannot take advantage of the want of a more express notice (*m*). To affect a joint-stock bank with notice of a dissolution of partnership by members of a trading firm, it is not sufficient that one of the directors of the bank, who was also a member of the trading firm,

(*i*) *Saville v. Robertson*, 4 T. R. 720. See *Wilson v. Whitehead*, 10 M. & W. 503, the authority of which is, however, doubted by *Wightman, J.*, in *Kilshaw v. Jukes*, 3 B. & S. 847.

(*k*) *Graham v. Hope*, Peake's N. P. C.

154. See also *Gorham v. Thompson*, Peake's N. P. C. 42.

(*l*) *Godfrey v. Turnbull and another*, 1 Esp. N. P. C. 371.

(*m*) *Barfoot v. Goodall*, 3 Campb. 147.

had knowledge of such dissolution (*n*). In an action against the drawers of a bill of exchange, purporting to be drawn by a firm upon one of the partners constituting the firm, if it be proved that the bill was accepted by such drawee, this will be sufficient evidence of the bill having been regularly drawn (*o*), and further, it is not necessary, in such case, to prove that the drawers received express notice of the dishonour of the bill, because this must necessarily have been known to one of them, and the knowledge of one is the knowledge of all (*p*). To establish a partnership between two defendants, a verdict on the issue directed out of a court of equity; to try whether the defendants were partners, and for what time, on a bill filed by one of them against the other, is admissible evidence to establish a partnership, the verdict having found them to be so (*q*). Where a foundation has been laid by *prima facie* evidence of a partnership, the declaration of one partner is evidence against another partner (*r*). A. advanced money to G., who was getting up a company to work a mine, receiving as security a deposit of 250 shares, with an option to take them in satisfaction of the advance, such option to be declared in fourteen days. A. never did in terms declare his option, but went down to the mine and made inquiries, and permitted the captain of the mine to represent him as a capitalist, who had a large share in the mine and intended to work it vigorously. In an action by a person who had supplied goods to the mine, upon the faith of representations made by the captain of the mine, that the mine was being worked by a person of substance, whose name he was not authorized to name, it was held, that the jury were warranted in inferring that A. was a partner, although his name was never mentioned, personal identification being sufficient (*s*). A father who holds out to the world that his son is his partner, and who sends bills and signs receipts in their joint names, in an action brought in his own name is not precluded from showing that his son is not a partner (*t*). When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. Hence an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts, that took place *during* the partnership, is competent evidence to charge the other partner (*u*). Thus it has been held, that a part payment made by one partner, after the dissolution of the partnership, will revive a debt as against the other partner, otherwise barred by the Statute of Limi-

(*n*) *Powles v. Page*, 3 C. B. 16; 15 L. J., C. P. 217.

(*o*) *Porthouse v. Parker*, 1 Campb. 82.

(*p*) See *Alderson v. Pope*, 1 Campb. 404, n., where it was held by Lord *Ellenborough*, C. J., that notice to one member of a firm was notice to the whole partnership.

(*q*) *Whateley v. Menheim and another*, Esp. N. P. C. 608.

(*r*) *Per Ellenborough*, C. J., in *Nicholls v. Dowding*, 1 Stark. N. P. C. 81.

(*s*) *Martyn v. Gray*, 14 C. B. (N. S.) 824.

(*t*) *Glossop v. Colman*, 1 Stark. N. P. C. 25, recognized in *Barker v. Stubbs*, 1 M. & Gr. 44; 1 Scott, N. R. 131. See *Radcliffe v. Rushworth*, 33 Beav. 484.

(*u*) *Wood v. Braddick*, 1 Taunt. 104.

tations (x). But a declaration by one of two partners is not evidence to charge the other with respect to a transaction with that other partner which occurred *previous* to the partnership, unless a joint-responsibility in the subject-matter is shown (y). If a member of a firm accept a bill in the name of the firm, drawn upon him by his separate creditor, on account of his separate debt, the presumption is that the bill is so accepted without the concurrence of the other members of the firm, and that the creditor knows it (z).

A., being indebted to B. and C., partners, and being informed of the intended dissolution of partnership, gave a warrant of attorney to B. alone, who managed the concerns. A. afterwards committed an act of bankruptcy; and after that, and after a dissolution of partnership, paid the money to B.; B. died. The assignees of A. sued C. for the money; and it was held, that they were entitled to recover; for the money being paid in respect of a debt due to the partnership, both parties were liable to refund, unless some stipulation could be shown to exonerate C. from his liability (a). If one of several partners promise individually to pay a debt without making any mention of his partners, such promise is conclusive evidence that the debt was due from him individually, and not from the partnership, and he will not be permitted to show that it was due jointly from himself and his partners (b).

The following memorandum signed by the plaintiff, a member of the provisional committee of a joint-stock company, was indorsed upon the registered copy of the deed of settlement produced by the defendant:—"We do hereby certify that the within-written deed is the deed of settlement of the U. G. Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth;" it was held, that the copy was primary evidence against the plaintiff of the contents of the deed (c).

(x) *Goddard v. Ingram*, 3 Q. B. 839.
But see now 19 & 20 Vict. c. 97, s. 14.

(y) *Per Abbott, C. J.*, in *Catt v. Howard*, 3 Stark. N. P. C. 3.

(z) *Levison v. Lane*, 32 L. J., C. P. 10; 13 C. B. (N. S.) 278; and see *ex parte The Darlington and Stockton Banking*

Company, Re Riches, 11 L. T. (N. S.) 651.

(a) *Biggs v. Fellowes*, 8 B. & C. 402.

(b) *Murray v. Somerville*, 2 Campb. 99, n.

(c) *Boulter v. Peplow*, 9 C. B. 493; 19 L. J., C. P. 190.

CHAPTER XXXII.

QUO WARRANTO.

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I. *Of the Origin and Nature of Quo Warranto Informations, and Statutes relating thereto, viz. Stat. 4 & 5 Will. & Ma. c. 18, and 9 Ann. c. 20.*

THE ancient writ of *quo warranto* (a), whence the information of the present day derives its origin, was in the nature of a writ of right for the king, against persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the crown, to inquire by what authority they maintained their claim, in order to

(a) See the form in Rastal's Entr., 540, b. edit. 1670, where the writ appears to have been prosecuted by the king's attorney-general before the justices in

eyre, who are empowered by stat. 18 Edw. I., stat. 2, s. 2, (A. D. 1290,) to determine pleas of *quo warranto*. See 2 Inst. 497.

have the right determined. The judgment on this writ was, that the franchise *capiatur in manum domini regis* (b). This writ having fallen into disuse, on account of the delay with which it was attended, a more expeditious mode of proceeding has been adopted, *viz.* an information filed by the king's attorney-general, in nature of a *quo warranto*, in which the person usurping is considered as an offender, and consequently punishable by fine. The court, however, will not extend this remedy beyond the limits prescribed to the old writ; and, as that could only be prosecuted for an usurpation on the rights or prerogatives of the crown, so an information in nature of *quo warranto* can only be granted in such cases (c); and upon this principle the court refused to grant an information to try the validity of an election to the office of churchwarden (d).

By stat 4 & 5 Will. & Ma. c. 18, it is enacted, "That the clerk of the Crown-office shall not, without express order of the court, receive or file any information for trespass, or other misdemeanour, or issue any process thereon, before he shall have taken, &c., a recognizance from the prosecutor to the defendant, in the penalty of 20*l.*, to prosecute with effect: and in case the defendant shall appear and plead to issue, and the prosecutor shall not, at his own costs, within one year after issue joined, procure the same to be tried (e), or in case the defendant shall have a verdict, or a *noli prosequi* be entered by the informer, the court may award the defendant costs, &c., unless the judge shall, at the trial, certify that there was a reasonable cause for exhibiting the information; and if the informer does not pay the costs taxed within three months after demand, the defendant shall have the benefit of the recognizance to compel him." Although the words of this statute relate only to informations for trespasses, batteries, and other misdemeanours, yet it has been held to extend to informations in nature of *quo warranto*, to try the right of usurping on public franchises; consequently such informations cannot be filed without leave (f), nor can process be issued thereon without a recognizance (g), and the defendant is entitled to costs in the cases provided for by the statute, as far as the recognizance extends, that is, to 20*l.* but not further (h). The foregoing statute is confined to informations exhibited in the King's Bench (i).

(b) See Rast. 540, b.

(c) See *post*, p. 1114.

(d) *R. v. Shepherd*, 4 T. R. 381; *R. v. Darbeny*, Str. 1196; but see *per Tindal*, C. J., 12 Cl. & F. 539; *Exp. Mawby*, 3 E. & B. 718; and *ante*, p. 1018.

(e) *R. v. Howell*, Ca. Temp. H. 247.

(f) *Per Lord Hardwicke*, C. J., *R. v. Howell*, Ca. Temp. H. 248.

(g) *R. v. Mayor of Hertford*, Carth.

503; Salk. 376.

(h) *R. v. Howell*, Ca. Temp. H. 249; *S. C. ut videtur*, under the name of *R. v. Morgan*, Str. 1042; *R. v. Filewood*, 2 T. R. 145; *R. v. Brooke*, 2 T. R. 197; *R. v. Savile*, 18 Q. B. 703. The ground of the decision appears to have been that such usurpations are misdemeanours. See Ca. Temp. H. 248.

(i) *R. v. Roberts*, 2 B. & Ad. 63.

The usurpation of offices and franchises in corporations constitutes the principal ground for applications to the court for this kind of information. By the common law, such usurpations could be punished only by a prosecution at the king's suit, though the dispute were really between party and party (*k*). To remedy this inconvenience, it was enacted, by 9 Ann. c. 20, s. 4, that in case any person should usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises (*l*), the proper officer of the court may, with leave of the respective courts, exhibit informations in the nature of *quo warranto*, at the relation of any person desiring to prosecute the same, (and who shall be mentioned in the information to be the relator,) against the person usurping, and proceed therein as is usual in informations in the nature of a *quo warranto*; and if it shall appear to the courts, that the several rights of divers persons may properly be determined on one information, the courts may give leave to exhibit one information against several persons; the parties prosecuted are to plead the same term or sessions in which the information is filed, unless further time be allowed by the court, and the prosecutors are to proceed with the most convenient speed. By the 5th section, the courts are authorized to give judgment of ouster against, and to fine the parties, if found guilty of the usurpation, and to award costs to the relator; but if judgment be given for the defendants, then the court may award costs against the relator.

Before the statute of Queen Anne, a private person could not interpose in *quo warranto*; the crown, by the attorney-general, could alone file such informations; but although this statute gives liberty to file such informations at the relation of a particular person, who is made liable to costs if there be judgment for the defendant, yet they must be filed with leave of the court (*m*).

The courts will not stay proceedings until the prosecutor gives security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested (*n*). And though a person, whose election to the office of town-councillor is void by reason of the mistake of the presiding officer, is willing to disclaim, and consents to a rule for a *quo warranto* being made absolute, the court will not order that the relator should bear the expense of the information and dis-

(*k*) In informations at common law, there is no relator.

(*l*) *i. e.* the offices of mayors, bailiffs, portreves, and other offices within cities, towns corporate, boroughs, and *places*, (that is, places of the same kind with those before enumerated, see 5 T. R. 879), in England and Wales, and the franchises of being burgesses or freemen. See the preamble. "All corporations consist of officers and freemen. This statute

was meant to extend to both." *Per* Lord Mansfield, C. J., in *R. v. Williams*, 1 Bl. R. 95.

(*m*) *Per* Lord Mansfield, C. J., in *R. v. Trelawney*, H. 5 Geo. III. MS., and *per* Wilmut, J., in *S. C.*, 3 Burr. 1615. But see the remarks of Mr. Tancred, in his valuable treatise on Informations in Nature of Quo Warranto, p. 14.

(*n*) *R. v. Wynne*, 2 M. & S. 346.

claimer (o). The provisions respecting error in the Common Law Procedure Act, 1852, do not apply to informations in the nature of *quo warranto* (p). It was observed by *Wilmot, J. (q)*, that the two acts of parliament (of 4 & 5 Will. & Ma. c. 18, and 9 Ann. c. 20,) relate to quite different objects, and are the reverse of each other. The former *restrains* the clerk of the crown in the Court of King's Bench from exhibiting or filing informations *without leave* of the court, in cases where all the king's subjects might, before the making of that act, have made use of the king's name, *without such leave*. The latter *lets in every person* who desires it, to make use of his name in prosecuting usurpers of franchises; whereas, before, *no subject* could have done so: but it provides, that *these* informations, (as well as those for misdemeanours,) must be under the leave and discretion of the court; and the court ought not to give such leave without sufficient reason. The court will make the rule absolute, although the party after rule obtained resigns the office, and his resignation is accepted (r), where the object of the relator is not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office, as in such a case the relator is entitled to have judgment of ouster, or a disclaimer entered on the record (s).

The stat. 9 Ann. c. 20, only regulates the proceedings on informations against individuals (t) usurping corporate offices or franchises in corporate places; it does not extend to a private company: and consequently, in other cases where the information at common law is exhibited, advantage cannot be taken of the foregoing provisions (u). If any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation, as a body, can be brought only by and in the name of the attorney-general (v). In the information at common law there is not any relator; but the addition of a relator to an information at common law may be rejected as surplusage (x). Doubts appear to have been entertained, whether in the common law information a judgment of ouster could be given. In *R. v. Mayor of Hertford*, Lord Raym. 426,

(o) *R. v. Hartley*, 3 E. & B. 143; *R. v. Sydney*, 2 L. M. & P. 149; and see *R. v. Morton*, 4 Q. B. 146.

(p) *R. v. Seale*, 5 E. & B. 1.

(q) *R. v. Trelawney*, 3 Burr. 1616.

(r) *R. v. Warlow*, 2 M. & S. 75.

(s) *R. v. Blizard*, L. R. 2, Q. B. 55.

(t) *R. v. Corporation of Carmarthen*, 2 Burr. 869.

(u) *Horn v. Cutlers' Company*, B. R. E. 9 Geo. II., MS. But see *R. v. Highmore*, 5 B. & A. 771, where it was held, that an information may be granted within the 9 Ann. against a party for exercising the office of bailiff in the borough

of M., although it was not a corporate office. See, however, this case explained by *Bayley, J.*, delivering judgment of court, in *R. v. M'Kay*, 5 B. & C. 645, where it was held, that the provisions of the statute, as to writs of mandamus and *quo warranto* informations, apply wholly to corporate offices in corporate places. See also *R. v. Attwood*, 4 B. & Ad. 481; and *R. v. Powell*, 3 E. & B. 377.

(v) Per Lord Tenterden, C. J., *R. v. Ogden*, 10 B. & C. 233, recognizing *R. v. Corporation of Carmarthen*, 2 Burr. 869.

(x) Per *Denison, J.*, 1 Burr. 498.

Holt, C. J., spoke of this as the proper form of judgment. In *R. v. Bennet* (y), Trin. 4 Geo. I., the judges were equally divided on the question; but in *R. v. Ponsonby* (z) it was solemnly determined, that unless the case of the person found guilty be within the statute, judgment of ouster ought not to be given (a). It has also been expressly decided, that, unless the case be within the statute, judgment for costs ought not to be given (b).

The preceding remarks will be found material, inasmuch as there are many cases not mentioned in the statute, in which informations in nature of *quo warranto* will lie; e. g., it will lie against a private person or against a corporation, for holding a market, a court-leet, or other court, or for exercising any other franchise; that is, the king's attorney-general may exhibit informations for the usurpation of these franchises upon the crown; but whether informations for such usurpations can be granted upon the application of a private person, is a question which has not hitherto received a solemn determination. The point underwent considerable discussion in the case of *R. v. Marsden* (c). *Yates*, J., thought that, as every usurpation of a franchise was a misdemeanour, a private person *might* apply as for the misdemeanour; but he, together with the other judges, declined giving any fixed opinion: in the case then before the court, it was not sufficiently shown, that there had been an usurpation; the court therefore refused to grant the information on that ground. There must be an information against each person to enable each to disclaim, for distinct offices; and the court will not consolidate them (d).

Proceedings against the City of London in the time of Charles the Second.

By the suggestion of evil counsellors, and in order to increase the power and influence of the crown, it was deemed expedient, in the latter end of King Charles the Second's reign, to new-model the corporate cities and boroughs. Against many corporations, (which declined surrendering their charters voluntarily,) informations, in nature of *quo warranto*, were filed, grounded upon the notion that such corporations had forfeited their franchises through neglect or by abuse of them. An information of this kind was filed against the corporation of the City of London. The charge against them was, that they had forfeited the liberty of being a corporation,—first, by making a bye-law for the levying several sums of money on the king's subjects coming to the public markets within the city to sell their provisions. Secondly, by having in

(y) Cited in Say. R. 247.

(z) M. 29 Geo. II., Say. R. 245.

(a) See, however, 1 Burr. 402.

(b) *R. v. Williams*, 1 Burr. 402; 1 Bl. R. 93; *R. v. Wallis*, 5 T. R. 375; *R.*

v. Hall, 1 B. & C. 237; *R. v. M'Kay*, 5 B. & C. 640.

(c) 3 Burr. 1812; 1 Bl. R. 579.

(d) *R. v. Warlow*, 2 M. & S. 75.

common council voted a petition to the king, stating that by the prorogation of the parliament on the 10th of Jan. 32 Car. II., the prosecution of the public justice of the kingdom had received interruption, and by ordering the said petition to be printed, with intent that it should be dispersed amongst the king's subjects, to induce an opinion that the king, by proroguing the parliament, had obstructed the public justice, and to incite the king's subjects to a hatred of his person and government, and to disturb the peace of the kingdom. The case came before the court upon demurrer, which was joined in M. T. 34 Car. II., at which time *Pemberton* was C. J. of the King's Bench; but before H. T., when it came to be argued, Sir *E. Saunders*, who had been counsel for the crown in drawing and advising upon the pleadings, was appointed C. J. of the King's Bench, in the room of *Pemberton*, who entertained doubts (e). It was argued twice: the first time in H. T. 35 Car. II., 1682-3, by *Finch*, solicitor-general, for the crown, and Sir *G. Treby*, recorder of London, for the corporation; the second time in E. T. 35 Car. II., 1683, by Sir *R. Sawyer*, attorney-general, for the crown, and *Pollexfen* for the corporation. It was contended, on the part of the crown, that a corporation may be forfeited; that corporations have the same creation as other franchises, and subsist upon the same terms; that there is a trust annexed to all franchises, that they be not abused; and the breach of them is a forfeiture. It was then insisted, that any act of the mayor, aldermen, and common-council, in common-council assembled, was so much an act of the corporation as would make a forfeiture; and lastly, it was urged, that the acts in question were such acts as, being done by the corporation, worked a forfeiture. It was argued, on the part of the corporation, that no corporation since the foundation of the monarchy, had ever yet been exposed to forfeiture, and the thing itself implied an absurdity; that a corporation as such, was incapable of all crime and offence, and none were answerable for any iniquity, but the persons themselves who committed it. That the members, in choosing magistrates, had intrusted them with legal powers only; and where the magistrates exceeded those powers, their acts were void, but could never involve the body itself in criminal imputation: that such had ever been the practice of England, except at the Reformation, when the monasteries were abolished: but this was an extraordinary case, which it was afterwards thought necessary to ratify by an act of parliament: that corporate bodies, framed for public good, and calculated for perpetual duration, ought not to be annihilated for the temporary faults of their members, who might themselves, without injuring the community, be questioned for their offences. Judgment was given in Trin. T. 35 Car. II., that the liberty, privilege, and franchise of the mayor, commonalty, and citizens, being a body politic and

(e) See Burnet's History of his Own Time, vol. ii. p. 925, edit. 12mo. 1725.

corporate, should be seized into the king's hands as forfeited. This was a great extension of the prerogative; but it was conceived by the king's advisers, that the example of this proceeding against the metropolis might have an effect (as in fact it had) upon other corporations; and that the crown would be enabled, upon granting new charters, to name the magistrates. This violent exercise of the prerogative, as far as it respected the City of London, was strongly marked by stat. 2 Will. & Ma. sess. 1, c. 8, which reversed the judgment, and declared that the mayor, commonalty, and citizens of the City of London, should for ever continue a body corporate and politic *in re, facto, et nomine*, without any seizure or forejudger of the said franchise, liberty, and privilege, or being thereof excluded or ousted, upon any pretence of any forfeiture or misdemeanour any time theretofore, or thereafter to be done, committed, or suffered.

II. *In what Cases the Court will grant an Information in Nature of Quo Warranto.*

It is a clear point in municipal law that, where a man is *bond fide* in office, his title is not to be tried by mandamus, but by *quo warranto*; and it may be safely said that *quo warranto* is the proper proceeding except where the disputed election is merely colourable so as to be no election at all (*f*). Therefore, if a party has been ousted of an office by the election of another party to that office, (the election not being merely colourable,) his remedy is not by mandamus, but by an information in the nature of a *quo warranto* (*g*).

Having endeavoured to explain the general nature of the *quo warranto* information, and having set forth the alterations made by the statute of Queen Anne, in cases relating to corporate offices and franchises in corporate places, I shall proceed to inquire, what the nature of the office must be for the usurpation of which the court will grant this information. In the case of *R. v. Boyles*, Str. 836, 2 Lord Raymond, 1559, it was held, that it is not necessary to set forth in the information the whole constitution of the place; or to show, whether the office is by charter or prescription. If it be alleged to be an office, which appears upon the face of the information to concern the public, this is sufficient against the person who usurps it. "After the consideration of all the cases and dicta on this subject," says Chief Justice *Tindal* (*h*), "the

(*f*) *Frost v. Mayor of Chester*, 5 E. & B. 531.

(*g*) *R. v. Mayor, &c. of Oxford*, 1 Nev. & P. 474; 6 A. & E. 349; *ante*, p. 1021.

(*h*) Delivering the opinion of the judges in *Darley v. R.*, 12 Cl. & F. 520, 541.

result appears to be, that this proceeding by information in the nature of *quo warranto*, will lie for usurping any office, whether created by charter alone or by the crown, with the consent of parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant, held at the will and pleasure of others; for, with respect to such an employment, the court certainly will not interfere, and the information will not properly lie" (i). "As to the granting of an information in nature of *quo warranto*, I cannot conceive that it can be done against a mere servant of a corporation, one who exercises no franchise or authority of any kind under the crown" (j).

A *quo warranto* information has been held not to lie for the office of governor and director, elected annually by rated inhabitants, under a local act, for the government of the poor and maintenance of a nightly watch (k). Nor for the office of guardian of the poor for a union, under 4 & 5 Will. IV. c. 76 (l). These decisions, however, were shaken, if not overruled, by *Darley v. The Queen* (m); and it is now held that it will lie in respect of the office of a guardian of the poor (n). And an information in nature of *quo warranto* has been granted against a party claiming to act as guardian of the poor in Exeter, under 28 Geo. III. c. 76 (o). So, also, it has recently been held, that a *quo warranto* does lie for the office of clerk to the guardians of a union; because, in general, it lies for an office though not immediately derived from the crown, if it be so mediately; if it be an independent substantive office; and if it be of a public nature (p). But a *quo warranto* will not be granted in the case of a clerk to borough justices (q), as such officer is removable at the pleasure of the justices (r). The court permitted an information to be exhibited against the defendant, who exercised the office of bailiff of a ville: because it appeared, that it was a public office, and concerned the government of the ville, and the administration of public justice (s). So, the court will grant an information in the nature of *quo warranto* against

(i) See per Bayley, J., in *R. v. Ogden*, 10 B. & C. 233; *R. v. Mousley*, 8 Q. B. 946.

(j) Per Lawrence, J., *R. v. The Corporation of Bedford Level*, 6 East, 367. See *R. v. Keyningham Level*, 11 Jur. 58, n.

(k) *R. v. Ramsden*, 3 A. & E. 456, per Littleale and Patteson, JJ., recognized and adopted by Lord Denman, C. J., in the matter of *The Aston Union*, 6 A. & E. 785; *R. v. Henley*, 3 A. & E. 463, per Tenterden, C. J., *Taunton and Patteson, JJ.*, diss. See *R. v. Stoke Damarel*, case of Sexton, 5 A. & E. 581.

(l) In *re Aston Union*, 6 A. & E. 784.

(m) 12 Cl. & F. 520, *supra*, and see *R. v. St. Martin's in the Fields*, 17 Q. B. 149.

(n) *R. v. Hampton*, 13 L. T., Ch. N. 1, 431 Q. B.

(o) H. T. 1816, *ex relatione magri. Dealtry*, 3 A. & E. 476, in *R. v. Beedle, S. P.*, where local act created a corporation, cited by Coleridge, J., in *R. v. Mayor, &c. of Oxford*, 1 Nev. & P. 479.

(p) *R. v. St. Martin's in the Fields, supra*; *Hill v. R.*, 8 Moo. P. C. C. 139.

(q) 5 & 6 Will. IV. c. 76, s. 101.

(r) *Re Fox*, 27 L. J., Q. B. 151.

(s) *R. v. Boyles*, Str. 836; 2 Lord Raym. 1559.

the portreve of a borough and manor, who, as portreve, is returning officer of the borough (*t*). So, against a person claiming to have a right of voting by virtue of a burgage tenement (*u*). So the proper course to get rid of a name improperly put on the burgess roll, under the Municipal Corporation Act, is by *quo warranto* (*v*). So, it will lie against the bailiff of a borough and manor, who being a prescriptive officer and member of the court-leet, has power to summon and select the jury; for such discretionary power is a material and important function in the administration of justice (*x*). So, against the clerk of a county court (*y*). But where a county court judge had been removed by the Chancellor of the Duchy of Lancaster, for inability and misbehaviour, and it was not made to appear to the court that the relator had not been fully heard, or that the charges, if true, did not show inability and misbehaviour, the court refused a rule, considering the decision of the chancellor final (*z*). So, against the steward of a court-leet (*a*). So, against the constable of a parish (*b*). There must be an user as well as a claim of a franchise, before the court can entertain an application for an information (*c*). Under 5 & 6 Will. IV. c. 76 (*d*), (Municipal Corporation Act,) the court will not grant a *quo warranto* information, unless it be shown that the party is in office *de facto*; and for this purpose it is not enough if the affidavit states simply that he has "accepted the office," without specifying the mode of acceptance; although it be sworn that the presiding alderman has declared the party duly elected (*e*). But where the affidavit stated that the party had taken upon himself the office, and *acted* in that capacity, and had been seen present at meetings of the council acting as a councillor, though the nature of the acceptance or acting was not further specified, and though it was not stated that he had made the declaration under the 50th sect. of the 5 & 6 Will. IV. c. 76, the court held the affidavit sufficient (*f*). Where, in an application for a *quo warranto* against a constable, the affidavits in support of the rule stated that, for fifty years back and as long as deponents could recollect, there had been a custom to elect a constable in a

(*t*) *R. v. Mein*, 3 T. R. 596, Borough of Fowey.

(*u*) *Horsham case*, 3 T. R. 599, n.

(*v*) *Seal v. R.*, 8 E. & B. 22; 27 L. J., Q. B. 139. See *R. v. Lichfield*, 1 Q. B. 453.

(*x*) *R. v. Bingham*, 2 East, 308, Borough of Gosport. It appeared in this case, that the bailiff was not entitled to any fees, so that an action for money had and received could not have been brought to try the defendant's title; a circumstance which seems to have influenced the decision of the court. See *ante*, p. 1029.

(*y*) *R. v. Owen*, 15 Q. B. 476.

(*z*) *Exp. Ramshay*, 18 Q. B. 173.

(*a*) *R. v. Hulston*, Str. 621.

(*b*) *R. v. Booth*, 12 Q. B. 884; *R. v. Goudge*, Str. 1213.

(*c*) *R. v. Whitwell*, 5 T. R. 85; *Reg. v. Pepper*, 7 A. & E. 745; *Re Armstrong*, 25 L. J., Q. B. 238. As to what will amount to an user, see *R. v. Tate*, 4 East, 337.

(*d*) Amended by 7 Will. IV. & 1 Vict. c. 78; 5 & 6 Vict. c. 104; 6 & 7 Vict. c. 89; 15 Vict. c. 5; and 16 & 17 Vict. c. 79.

(*e*) *Reg. v. Slatter*, 11 A. & E. 505.

(*f*) *Reg. v. Quayle*, 11 A. & E. 508; 4 P. & D. 442; *R. v. Grimshaw*, 10 Q. B. 747.

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particular mode, but did not state that they believed such custom to be immemorial; it was held, that it was not sufficient (g).

By rule of court, (H. T. 7 & 8 Geo. IV., 1827,) (h) reciting that vexation and expense had been occasioned to defendants, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the court; it was ordered, that henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to show cause; and no objection, not so specified, shall be raised by the prosecutor on the pleadings without the special leave of the court or some judge thereof. To a *quo warranto* information for exercising the office of town councillor of a borough the defendant pleaded that he was elected by a majority of the votes of the burgesses which was traversed. It was held that the relator might go into the validity of other votes besides those to which objection had been specially made on obtaining the rule (i).

And by another rule of court, (M. 3 Vict.) (j), it is ordered, that no rule be granted for filing an information in nature of a *quo warranto*, unless at the time of moving, an affidavit shall be produced, by which some person shall depose, upon oath, that such motion is made at his instance as relator, and that such person shall be deemed to be the relator in case such rule shall be made absolute, and shall be named as such relator in such information in case the same shall be filed, unless the court shall otherwise order. Under the foregoing rule the affidavit must state *at whose instance* the application is made; it is not sufficient for a party to depose, that if the court grant the information, it is his intention to become really and *bonâ fide* the relator (k). If the motion for a *quo warranto* be made on the affidavits of three persons, two of whom are not qualified to be relators, the information may nevertheless be granted, if the third party be unobjectionable as a relator, though his affidavit does not show sufficient ground for the information (l). Any inhabitant of a borough may be a relator, although he is not a burgess (m).

The court have established a general rule to guide them in exercising their discretionary power of permitting informations in nature of *quo warranto* to be filed, that they will not permit one corporator to object to the title of another, if he has concurred in the election of that other, or acknowledged his title by acting with him; or if the objection that he makes to the title of that other be equally applicable to his own, or to the title of those under whom he claims (n). It is a valid objection to a relator applying for a *quo*

(g) *R. v. Lane*, 5 B. & A. 488.

(h) See 6 B. & C. 267.

(i) *R. v. Trugwell*, L. R. 3, Q. B. 704.

(j) 11 A. & E. 2.

(k) *R. v. Hedges*, 11 A. & E. 163. See

R. v. Anderson, 2 Q. B. 740.

(l) *R. v. Parry*, 6 A. & E. 810.

(m) *Reg. v. Quayle*, 11 A. & E. 508.

(n) *R. v. Cudlipp*, 6 T. R. 503, Borough of Launceston.

warranto information for usurping the office of burgess that he was formerly present at, and concurred in, the election of another burgess, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected(o). But, on motion for a *quo warranto* against a capital burgess, on the ground of irregularity in his election, it is no answer that the relator frequently acted with the party against whom he applies, in corporation business, during the two years following such party's election, the relator not being shown to have concurred in that election; nor is the relator disqualified by the mere circumstance of having formerly taken part in other elections, where the same irregularity as now complained of existed, but *was not noticed* (p). It is not competent to a stranger to the corporation, although an inhabitant of the town, to impeach the title of a corporator, unless he can show that, as an inhabitant, he is subject to the local jurisdiction of the body corporate. And it is a valid objection to a relator, that he was present and concurred *at the time* of the objectionable election, even although he was then ignorant of the objection: for a corporator must be taken to be cognizant of the contents of his own charter, and of the law arising therefrom (q). The principle is, that he who has concurred in inducing a party to exercise an office cannot be heard on an application to turn him out of the office (r). Hence, an officer who, knowing the supposed disqualification, administered the declaration prescribed by sect. 50 of 5 & 6 Will. IV. c. 76, to the defendant, cannot be heard as relator (s). But a person who is estopped from being a relator, is allowed to make an affidavit in the rule for the *quo warranto* (t). The court will not make the rule absolute, where the relator appears to be a man in low and indigent circumstances, and there are strong grounds of suspicion that he is applying, not on his own account, or at his own expense, but in collusion with a stranger (u). It is in the discretion of the court to grant the information or not; and under circumstances tending to throw suspicions on the motives of the relator, they will not grant it, where the consequence will be to dissolve a corporation (v). It has been generally considered as a rule of corporation law, that a person is not to be permitted to impeach a title conferred by an election in which he has concurred, or the titles of those mediately or immediately derived from that election (x).

Formerly, elections under the presidency of a bad mayor or .

(o) *R. v. Parkyn*, 1 B. & Ad. 690; *R. v. Symmons*, 4 T. R. 223.

(p) *R. v. Benney*, 1 B. & Ad. 684.

(q) *R. v. St. John*, E. T. 52 Geo. III., MS., Borough of Wotton Bassett; *R. v. Hodge*, 2 B. & A. 344, n.

(r) *Per Lord Denman*, C. J., in *R. v. Greene*, 2 Q. B. 460.

(s) *R. v. Greene*, 2 Q. B. 460.

(t) *R. v. Brame*, 4 A. & E. 664.

(u) *R. v. Trevenen*, 2 B. & A. 339, Borough of Helleston, cited and distinguished in *R. v. Wakelin*, 1 B. & Ad. 50.

(v) *S. C.*; and *R. v. Taylor*, 11 A. & E. 949.

(x) *Per Abbott*, C. J., in *R. v. Slythe*, 6 B. & C. 242.

other person were void. Hence where the mayor, who presided at the election of a new mayor, was only mayor *de facto*, and not *de jure*, and was subsequently removed by judgment of ouster; it was held, that the election of the new mayor was void (*y*). But now, by 7 Will. IV. & 1 Vict. c. 78, s. 1, no election of any person into any corporate office will be liable to be questioned by reason of any defect in the title or want of title of the person before whom such election may have been had, provided that the person before whom such election shall be had, shall be then in the actual possession of or acting in the office giving the right to preside at such election. Every corporator must be presumed to be conusant of that which has recently taken place in the corporation of which he is a member, unless he shows the contrary (*z*). But if a person should concur in an election in ignorance of some fact making it invalid, and should afterwards come before the court, and show the objection, and that it has come to his knowledge since the election, and that it is a matter which ought to be inquired into, the application might be heard (*a*). Where a rule is obtained upon the ground, that a party has vacated a corporate office by having accepted a second incompatible office, the affidavits must show a valid appointment to the second office, and that the offices are incompatible (*b*). Where different persons filling two offices would be in the relation of master and servant to each other, those offices cannot be held by the same person. But there is nothing inconsistent in one member of a body noting down the acts of the body. Thus, in the borough of Carmarthen, the offices of common councilman and town-clerk are not incompatible (*c*).

Votes given for candidate after notice of his being ineligible, are to be considered as thrown away, that is, as if the persons so voting had not voted at all (*d*). In such case, if there are other candidates who are duly qualified, he who has the greatest number of legal votes will be duly elected: but until he be sworn in, the office is not legally filled up and enjoyed by him, within the exception in the annual Indemnity Act. And, therefore, if the disqualified person who had the greatest number of votes be sworn into office, and afterwards qualify himself by making the declaration, &c. within the time allowed by the Indemnity Act, he is thereby re-capacitated, and his title to the office protected; such office not having been then vacated by judgment, or legally filled up and enjoyed by any other person (*e*). Votes given before notice of the ineligibility are not to be considered as thrown away (*f*).

(*y*) *R. v. Corporation of Bridgwater*, 3 Doug. 379.

(*z*) *R. v. Slythe*, 6 B. & C. 243.

(*a*) *Per Abbott*, C. J., in *R. v. Slythe*, 6 B. & C. 243.

(*b*) *R. v. Day*, 9 B. & C. 702.

(*c*) *R. v. Jones*, 1 B. & Ad. 677.

(*d*) *R. v. Hawkins*, 10 East, 211; *R. v. Parry*, 14 East, 549; *R. v. Coaks*, 3 E. & B. 249. See *per Wilde*, C. J., in *Gostling v. Veley*, 12 Q. B. 417; see also *S. C.* in Dom. Proc. 17 Jur. 939.

(*e*) *R. v. Parry*, 14 East, 549.

(*f*) *R. v. Bridge*, 1 M. & S. 76.

Repeal of the Corporation and Test Acts.

By the Corporation Act, 13 Car. II. stat. 2, c. 1, the election of corporate officers who had not taken the sacrament within one year next before their election, was declared to be void. By the Test Act (g), every person admitted, &c. into an office, civil or military, or receiving any pay, &c. by reason of any patent or grant of his majesty, or admitted into the family of his majesty, was required to take the oaths of supremacy and allegiance the next term, and subscribe the declaration against transubstantiation; and also receive the sacrament of the Lord's Supper, according to the usage of the Church of England, within three months (h) after his admittance into office, in some public church, upon Sunday, immediately after Divine service and sermon. Persons neglecting or refusing to take the oaths and sacrament, and being convicted of executing their offices after such neglect or refusal, were disabled from suing either at law or in equity; from being a guardian, executor, or administrator; from being capable of any legacy, or deed of gift, or to bear any office; and forfeited 500*l.* (i). Several attempts were made to obtain a repeal of the Corporation and Test Acts, but they were ineffectual until the year 1828, when, by stat. 9 Geo. IV. c. 17, such parts of the stats. 13 & 25 Car. II. and 16 Geo. II., as required the taking the sacrament, were repealed, and a declaration was substituted by the second section of that statute (9 Geo. IV. c. 17), in lieu of the sacramental test, which must, within one calendar month next before or upon admission, be made and subscribed in the presence of the proper officer (sect. 3), otherwise the election is void (sect. 4). The statute does not give the party elected a month, at all events, for deciding whether he will make the declaration or not, but only excuses him from making it at the time of his admission, if he has made it within a month before. The words, "upon admission," mean at the time, and not within a reasonable time after; and the authorities who admit, may prescribe the order in which the ceremonies forming parts of the admission shall take place. Hence, if a party offers himself to the proper court to be admitted, not having made the declaration within a month before, and being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election (j). But where a town clerk had been elected to hold his office during good behaviour, and had not made the declaration prescribed by 9 Geo. IV. c. 17, s. 2; it was held, that as having been an officer *de facto*, he was entitled to compensation under the 5 & 6 Will. IV. c. 76, s. 66 (k).

(g) 25 Car. II. c. 2, s. 2, A.D. 1672.

(h) Enlarged to six months by 16 Geo. II. c. 30, s. 3.

(i) 25 Car. II. c. 2, s. 3.

(j) *The Queen v. Humphery*, 10 A. & E. 335.(k) *R. v. Mayor of Cambridge*, 12 A. & E. 702; 1 G. & D. 294.

By 10 Geo. IV. c. 7, s. 14, any subject professing the Roman Catholic religion may be a member of any lay corporation, and hold any civil office or place of trust or profit therein, and do any corporate act, or vote in any corporate election, upon taking and subscribing the oath appointed by that act, instead of the oaths of allegiance, supremacy, and abjuration.

By 1 & 2 Vict. c. 15, instead of the declaration required by the act 9 Geo. IV. c. 17, that contained in 1 & 2 Vict. c. 5, may be taken by Quakers, Moravians, or Separatists, elected to office in any corporation.

By 8 & 9 Vict. c. 52, persons professing the Jewish religion are, on accepting municipal office, to make the declaration contained in that act.

III. *Of the Limitation of Time for Granting an Information.*

Stat. 6 & 7 Vict. c. 89, s. 5, for expediting certain Proceedings by way of Mandamus and Quo Warranto.

In the year 1767, in the *Winchelsea* cases, the Court of King's Bench determined that the period of possession after which a corporator ought not to be disturbed, by any information in the nature of a *quo warranto* granted under the discretion of the court, should be twenty years: this limitation was, in the year 1791, by rule of court, narrowed to six years, and that rule was afterwards confirmed by 32 Geo. III. c. 58. Sect. 1 of which statute enacts that the defendants to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited with leave of the court or by his Majesty's attorney-general, or other officer of the crown on behalf of his Majesty, and each and every of them, severally and respectively, may plead that he or they had first actually taken upon themselves, or held or executed, the office or franchise which is the subject of such information six years or more before the exhibiting of such information, such six years to be computed from the day on which such defendant *was actually admitted and sworn into* such office or franchise (*l*). The preceding statute having been made *in pari materia* with 9 Ann. c. 20, is confined to corporate officers (*m*). Where a rule nisi for a *quo warranto* information for exercise of a franchise was obtained within six years after the earliest time at which the defendant appeared to have exercised it, but the motion for a rule absolute was not made till the six years had expired, the court discharged the

(*l*) See *R. v. Brooks*, 8 B. & C. 323; cognized in *R. v. M'Kay*, 5 B. & C. 645, and see p. 1134. 646.

(*m*) *R. v. Richardson*, 9 East, 469, re-

rule; holding that it was too late, by the 32 Geo. III. c. 58, s. 1, to file the information (*n*).

By 7 Will. IV. & 1 Vict. c. 78, s. 23, every application to the Court of King's Bench, for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, councillor, or burgess, in any borough, shall be made before the end of twelve calendar months after the election, or the time when the person against whom such application shall be directed shall have been disqualified, and not at any subsequent time. Where the disqualification is created by entering into a continuing contract with the corporation, such disqualification arises *de die in diem*. Hence, in such case, no application for a *quo warranto* could be made after the lapse of twelve calendar months after the contract had ceased; but, while it continues, the application may be made at any time after its commencement (*o*).

The 6 & 7 Vict. c. 89, recites,* that doubts had arisen (*p*) whether, notwithstanding this enactment, applications in the nature of *quo warranto* might not still be successfully made against any person holding the office of mayor, on the ground that such mayor was not duly qualified to be so elected mayor, by reason of some defect or informality in his previous election to the office of alderman or councillor; although more than twelve calendar months might have elapsed since such election to such office so alleged to have been informal or defective, and likewise against other corporate officers upon grounds of the like nature; and then goes on to enact, That no election of any mayor of any of the boroughs named in schedules (A.) and (B.) of 5 & 6 Will. IV. c. 76, or in any borough to which a charter of incorporation may have been or may be hereafter granted under the provisions of that act and of the secondly recited act, or either of them, which has already taken place, or shall hereafter take place, shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor to which he may have been previously elected, unless application shall have been made to the Court of Queen's Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor, within twelve calendar months after such his election to the said office of alderman or councillor; and that from and after the passing of this act every election heretofore made, or hereafter to be made, to the office of mayor, alderman, councillor, or any other corporate officer in any of the boroughs aforesaid which shall not be or have been called in question by such application to the Court of Queen's Bench within twelve calendar months

(*n*) *R. v. Harris*, 11 A. & E. 518; 3 P. & D. 266.

(*p*) See *R. v. Preece*, 5 Q. B. 94; *R. v. Harvey*, 3 Q. B. 475.

(*o*) *R. v. Francis*, 18 Q. B. 526.

from such election, shall be deemed to have been to all intents and purposes a good and valid election. On a *quo warranto* information for exercising the office of mayor, it is no objection to the title that the party, who was councillor when elected mayor, is not shown to have been on the burgess roll at that time; it being admitted that he was *de facto* councillor when elected mayor, and that he was on the burgess roll when elected councillor (*q*).

The 5th section, after reciting, that it is expedient to render certain proceedings, by way of *quo warranto* and mandamus, so far as they affect corporate offices in boroughs, more summary and expeditious, enacts, That in all cases of intended application to the Court of Queen's Bench, either for a mandamus to proceed to an election of any corporate officer or officers (*r*) in any of the aforesaid boroughs, or for an information in the nature of a *quo warranto* against any person claiming to be a corporate officer of and in any of the said boroughs, it shall be lawful for the party intending to make such application, to give notice in writing thereof to the party to be affected thereby at any time not less than ten days before the day in the said notice specified for making such application; in which notice shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavits whereby the application will be supported; and thereupon it shall be lawful for the said last-mentioned party to show cause in the first instance against such application; and if no sufficient cause be shown, it shall be lawful for the Court of Queen's Bench, on proof of the due service of such notice and statement, and of the delivery of copy of such affidavits, as may be used for the purpose of supporting such application, to make the rule for such mandamus or information absolute, if the said court shall so think fit in the first instance; and also, if they shall so think fit, to direct that any writ of mandamus thereby ordered to be issued shall be peremptory in the first instance; and also, that the venue in any information thereby ordered to be filed, shall be laid in the County of Middlesex, or in the City of London, and that the issue or issues of fact thereon, if any, shall be tried at the sittings at Nisi Prius of the said Court at Westminster, or in London, by a jury of the same county or city respectively.

(*q*) *R. v. Dixon*, 15 Q. B. 33; *R. v. Preece*, 5 Q. B. 94; and see *Le Feuve v. Lancaster*, 3 E. & B. 530; *Whalley v. Bramwell*, 15 Q. B. 775; *R. v. Hodson*,

4 Q. B. 648, n.

(*r*) This does not apply to a mere burgess. *R. v. Milner*, 5 Q. B. 589.

IV. *Of the Construction of Charters, and of the Operation and Effect of a New Charter.*

Contemporaneous usage has always been considered as of great importance in the construction of charters (s) : not that usage can overturn the clear words of a charter ; but if they are doubtful, the usage under the charter will tend to explain the meaning of them (t). If a corporation has franchises and privileges by grant or prescription, and afterwards they are incorporated by another name, as if they were "the bailiffs and burgesses" before, and afterwards they are to be styled "the mayor and commonalty ;" yet the newly-named body shall enjoy all the franchises, privileges, and hereditaments, which the old corporation had either by grant or prescription (u). Where the king grants a charter to a corporation, there being a prior charter existing at the time, the new charter is void *ab initio* ; because two corporations, for the same purposes of government, cannot exist within one and the same place, and at one and the same time (v). Where a corporation takes its rise from the king's charter, the king by granting, and the corporation by accepting, another charter, may alter it : because it is done with the consent of all the parties who are competent to consent to the alteration. But the constitution of a corporation, as settled by act of parliament, cannot be varied by the acceptance of any charter inconsistent with it (w). A corporation cannot accept a part of the charter and not the whole. Per *Yates, J.*, in *R. v. Spencer*, Hil. 6 Geo. III., B. R. "An acceptance of a charter is like an attornment to a grant, which cannot be limited or qualified" (x).

By the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 1, so much of all laws, statutes, and usages, and of all charters, grants, and letters patent, relating to the several boroughs named in the Schedules A. and B., as are inconsistent with that act, are repealed. This statute has been amended by a subsequent act, 7 Will. IV. & 1 Vict. c. 78 (y), which enacts, that after the passing of this act, in case no election shall be made of any mayor, or any of the aldermen, councillors, or other corporate officers in any borough in the said schedules, upon the day or within the time appointed by the Municipal Corporation Act, or by this Act, for any such election, or such election being made, shall afterwards be-

(s) Per Lord Kenyon, C. J., delivering opinion of court, *R. v. Bellringer*, 4 T. R. 821.

(t) Per Lord Mansfield, C. J., in *R. v. Varlo*, Cowp. 250.

(u) 4 Rep. 77, b. ; per *Curr.*, *Haddock's case*, 1 Ventr. 355.

(v) *R. v. Amery*, D. P., 2 Bro. P. C.

366, Tomlins' edit.

(w) *R. v. Miller*, 6 T. R. 268.

(x) Per *Powell, J.*, in case of *Malmsbury Corporation*. Serjt. Hill's MSS., vol. 22, p. 271.

(y) And by 5 & 6 Vict. c. 104 ; 6 & 7 Vict. c. 89 ; 15 Vict. c. 5 ; and 16 & 17 Vict. c. 79.

come void, whether such omission or avoidance shall happen through the default of the officer who ought to preside at such election, or by any accident or other means, the corporation shall not thereby be deemed to be dissolved or disabled from electing such mayor, aldermen, or councillor, or other corporate officer, for the future; but in any case where no such election shall be made, the election for any such mayor, &c., may be had and proceeded with upon the day next after the day on which such election ought to have been made, unless such day shall happen to be on a Sunday, and then on the Monday following (z).

While a corporation exists capable of discharging its functions, the crown cannot obtrude another charter upon them. It is competent to them, either to accept or reject the proffered charter (a). A charter cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation (b). If there be an old charter surrendered, but the surrender is not inrolled, and a new charter, in consideration of the surrender, granted, the second charter is void (c). And if there be any other persons named in the new charter who were not in the old, any law made by them is void; because they act under a void charter; but otherwise if the members nominated are the same as in the old charter, because then they act by their first charter, which still remains good (d). Upon a *quo warranto* against the town of Liskeard, in the reign of Charles the Second, they surrendered their charter, which was not inrolled until the reign of King James the Second; who, in consideration of the surrender, granted a new charter to them. It was held, that the second charter, being in consideration of a void surrender, was also void (e). The stat. 7 Will. IV. & 1 Vict. c. 78, s. 49, empowers the crown, upon the petition of the inhabitant householders of any borough, to grant to them a charter of incorporation (f).

Where an application is made to the court for a mandamus, to direct the filling up of any vacancies in a definite integral part of a corporation, the court will require strong grounds to induce them to refuse the writ, on account of the great inconvenience which may follow from the not filling up such vacancies, and the risk of dissolving the corporation (g). The court will grant a rule for an information in nature of *quo warranto*, at the suit of a private relator, against an individual member of a corporation, on grounds

(z) Sect. 25.

(a) Lord Kenyon, C. J., *R. v. Pasmore*, 3 T. R. 240.

(b) *R. v. Westwood*, 4 B. & C. 781. Judgment affirmed on error, D. P. July 21st, 1830, 7 Bingh. 1, Borough of Chipping Wycomb.

(c) *R. v. Osbourne*, 4 East, 335.

(d) *Bully v. Palmer*, 12 Mod. 247;

Salk. 190.

(e) *Piper v. Dennis*, 12 Mod. 253.

(f) See, as to the construction and effect of this statute, *Rutter v. Chapman*, 8 M. & W. 1, recognized in *Rex v. Boucher*, 3 Q. B. 641.

(g) *R. v. Mayor of Grampond*, 6 T. R. 301.

affecting his individual title, although the affidavits on which the rule is moved disclose matter tending to dissolve the corporation (*h*). When a corporation is reduced to such a state as to be incapable of continuing its existence, and of doing any corporate act, it is extinct as a body corporate. In such case, it is competent to the crown to renovate it, by granting a new charter to the remaining members of the old corporation, in conjunction with others, or to others alone (*i*). It is not necessary that this charter should be accepted by a majority of the remaining members of the old corporation: it is sufficient if it be accepted by a majority of the grantees. Where a charter is silent as to the mode of continuing the succession, a corporation has a right of *necessity*, or an incidental power, to continue itself, and to make reasonable bye-laws for that purpose; as by election. Where, however, there is a provision of such a nature as is calculated *at all times* to continue the succession, without ever proceeding by way of voluntary election, that may afford a ground for presuming that voluntary elections were meant to be excluded; but where there is no provision affording a supply of burgesses *to that extent*, the corporation has the right of proceeding by election.

By the Municipal Corporation Act (*j*), after the passing of the act, no person is to be enrolled a burgess of any borough for the purpose of enjoying the rights conferred for the first time by the act, in respect of any title other than by occupancy and payment of rates within such borough, according to the meaning and provisions of the act (*k*). The rate must be paid by the party's own act; it is not sufficient that another person, without his authority, pays the rates for him (*l*).

By the same act, 5 & 6 Will. IV. c. 76, s. 52, if any person holding the office of mayor, alderman, or councillor shall be declared bankrupt, or shall apply to take the benefit of any insolvent act, or shall compound by deed with his creditors, or, being mayor, shall be absent for more than two calendar months, or, being an alderman or councillor, for more than six months at one and the same time, unless in the case of illness, from the borough, such person shall thereupon immediately become disqualified and shall cease to hold the office, and in case of such absence, shall be liable to the same fine as if he had refused to accept the office, and the council thereupon shall declare the office to be void. A bankrupt uncertificated at the time of election is not disqualified from being elected a councillor under this act. The disqualification exists only where the bankruptcy occurs during the holding of the office (*m*).

(*h*) *R. v. White*, 1 Nev. & P. 84; 5 A. & E. 613, recognized in *R. v. Parry*, 6 A. & E. 820.

(*i*) *R. v. Pasmore*, 3 T. R. 199.

(*j*) 5 & 6 Will. IV. c. 76, s. 13.

(*k*) See *R. v. Mayor of Lichfield*, 2 Q.

B. 693; 2 G. & D. 10.

(*l*) *R. v. Mayor of Bridgnorth*, 10 A. & E. 66.

(*m*) *R. v. Chitty*, 1 Nev. & P. 78; 5 A. & E. 609.

The 28th section of this act and the 58th section of 3 & 4 Vict. c. 108, enacted, that no person should be qualified to become a councillor or alderman of a borough who was interested in any contract with the council of the borough, although the contract were made before the passing of 5 & 6 Will. IV. c. 76 (n). By 5 and 6 Vict. c. 104, s. 1, the word "contract," in these enactments, shall not extend to any lease, sale or purchases of any land, tenements or hereditaments, or to any agreements for any such sale, lease or purchase, or for the loan of money, or to any security for the payment of money only (o). By the 72nd section of 5 & 6 Will. IV. c. 76, the body corporate are trustees or commissioners for executing, by the town-council, the powers and provisions of all acts of parliament, of which powers and provisions the old body corporate, or any of the members thereof, in their corporate capacity, were sole commissioners or trustees before the election of the town-council (p).

V. Bye-Laws.

Every corporation has power to make bye-laws (q). This power, like the power of suing, or the capacity of being sued, is included in the very act of incorporation; and it is not necessary, although usual, for the crown to confer this power in express terms (r). It is incident to the whole body of every corporation; and, therefore, if a charter give to a select body power to make bye-laws touching certain matters therein specified, that does not take away from the body at large their incidental power to make bye-laws touching other matters not specified in the charter (s). Where the corporation is by charter, such bye-laws may be made as will enforce the end of the charter in a way more convenient, and tending more to the care and good government of the society, than what the charter has prescribed. Hence, where it is directed by the charter, that the mayor, or aldermen, or other principal officers shall be chosen by the burgesses or commonalty at large, the corporation may, by common assent, for the purpose of avoiding popular confusion, make a bye-law, restraining the power of election to a select number

(n) *R. v. York*, 2 Q. B. 847; 2 G. & D. 105. See *R. v. Francis*, 18 Q. B. 526, cited *ante*, p. 1123; *Baker v. Marsh*, 4 E. & B. 144.

(o) See *Simpson v. Ready*, 11 M. & W. 344; and *Le Feuve v. Lancaster*, 3 E. & B. 530.

(p) *Staniland v. Hopkins*, 9 M. & W. 178.

(q) As to the bye-laws of railway companies, see *Williams v. Great Western Railway*, 10 Exch. 15; *Great Western*

Railway v. Goodman, 12 C. B. 313; 21 L. J., C. P. 197; *Chilton v. London and Croydon Railway*, 16 M. & W. 212. As to those of a Board of Health, see *R. v. Wood*, 5 E. & B. 49; *The Blackpool Board of Health v. Bennett*, 4 H. & N. 127.

(r) Hob. 211.

(s) *R. v. Westwood*, 4 B. & C. 781. Judgment affirmed on error, D. P., 7 Bingh. 1, Borough of Chepping Wycomb.

of burgesses or commonalty (*t*) ; that is, where the right of election is given to a whole class of men, they may restrain it to a part of themselves ; but where a corporation consists of several integral parts : as, 1st, the mayor ; 2ndly, the aldermen ; 3rdly, the commonalty ; and the right of election is given to the three parts conjointly, a bye-law excluding one integral part from the right of election, *e. g.*, the commonalty, is void (*u*).

By the Municipal Corporation Act (*v*), the council of any of the boroughs mentioned in the schedules of that act, are empowered to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for suppression of all such nuisances as are not already punishable in a summary manner, by virtue of any act in force throughout such borough, and to appoint such fines as they shall deem necessary for the prevention of such offences, under certain limitations.

In order to give validity to corporate acts, it is essentially necessary where, by the constitution of the corporation, there is a definite body, who form an integral part of the corporation, 1st, that a majority of that definite body should exist at the time when any corporate act is to be done (*x*). Hence, if an integral part of a corporation is reduced by the death of its members, so that there does not any longer remain a majority of such integral part, there is an end of the corporation (*y*). 2ndly, that a majority of that body must attend the assembly, where such an act is to be done (*z*). It is not, however, necessary, when met, that there should be a majority of each of the integral parts, to give validity to the corporate act ; it is sufficient if it be done by a majority of the whole when so properly assembled (*a*). "It has now been for many years an established principle in corporation law, that if an election is to be made by a definite body alone, or by a definite together with an indefinite body, a majority of the definite body must be present. The general rule, however, that a majority of each definite part of the elective body shall be present at the election, does not apply to all corporations : *e. g.*, it does not apply to Queenborough ; for, from the peculiar constitution of that corporation (*b*), the application of the rule would lead to an absurdity or impossibility." In the case of an election to an office by a select body, it is not

(*t*) Case of Corporations, 4 Rep. 77, b. ; *R. v. Powell*, 3 E. & B. 377 ; *R. v. Attwood*, 4 B. & Ad. 481. See also *Bather v. Boulton*, 1 Str. 314 ; *R. v. Bird*, 13 East, 375.

(*u*) *R. v. Head*, 4 Burr. 2515, Borough of Helston.

(*v*) 5 & 6 Will. IV. c. 76, s. 90.

(*x*) *R. v. Morris*, 4 East, 17.

(*y*) Lord Kenyon, C. J., *R. v. Grampond*, 6 T. R. 302.

(*z*) By 5 & 6 Will. IV. c. 76, s. 69, all

acts required by virtue of this act to be done by the council of any borough, shall be done and decided by a majority of the councillors present ; the whole number present not being less than one-third part of the number of the whole council.

(*a*) *R. v. Belringer*, 4 T. R. 819 ; *R. v. Miller*, 6 T. R. 268. As to what will constitute a majority, see *R. v. Overseers of Christchurch*, 7 E. & B. 409 ; and see *ante*, p. 1121.

(*b*) *R. v. Greet*, 8 B. & C. 369.

necessary in the notice to them to state the purpose of the meeting (c). If corporate acts are to be done by a select number of members upon a particular day, all who have a right to be present in that assembly ought to be summoned, and to have notice that they are to meet on the business (it is not necessary to specify what business) of the corporation (d). This rule admits of no exception, unless in the case where a member has absolutely deserted the town, by absenting himself and removing his family out of the town. It must be an entire departure from the place; for if the person has a house and family in a corporate town, though he be abroad at the time of holding the assembly, whether for his health, his diversion, or upon business, he ought to be summoned: When the notice is regularly given, a majority have power to do any corporate act—but if the whole assembly meet by accident, they may proceed on business, provided they are unanimous: but otherwise it is, if any one member of the corporation dissents, he has an absolute negative (e). But where the charter is silent on the subject, previous summons is only necessary for the purpose of preventing an election from taking place by surprise, *i. e.* by some of the electors, without due means of attendance upon that occasion being equally afforded to all the others. Hence, where the whole corporation are summoned for a particular purpose (*e. g.*, to receive the resignation of a common councilman), a *select body* who are *all present and consenting*, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman, in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons (f). When a meeting for election or a motion takes place on a day not appropriated to that purpose by the constitution of the borough, notice must be given to all the members. Where the custom was to serve a personal notice on all the resident burgesses; it was held, that a qualification of the custom, that an accidental omission to serve a burgess was not a violation of it, was bad in law (g). It is essential to the validity of a bye-law, that it should be consistent with, and that it should not be repugnant to, or contradict, the charter; for in a case where the charter directed that the mayor and aldermen, or the major part of them, should yearly nominate four of the burgesses, or inhabitants, to the commonalty at large, out of whom they were to elect one to be mayor, and who, at the end of his year, was to be an alderman; it was held, that a bye-law, providing that an *alderman*, who was an inhabitant, might be elected mayor, was bad, inasmuch as it was inconsistent with the

(c) *R. v. Pulsford*, 8 B. & C. 350.

(d) See *Roberts v. Price*, 4 C. B. 231; and see the notice of meetings of the council required by the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 69.

(e) *Per Lord Hardwicke*, C. J., in *R. v. Kynaston*, B. R., T. 8 & 9 Geo. II., MS.

(f) *R. v. Theodorick*, 8 East, 543.

(g) *R. v. Langhorn*, 4 A. & E. 538.

charter; because it was not intended that aldermen who were to nominate the candidates for the mayoralty, and who were to commence aldermen by serving the office of mayor, should be chosen mayors, because they happened to be inhabitants (*h*). A bye-law, though made by the whole body, if it narrow the number of those out of whom the election is to be made, is void. Hence, where the power of electing the mayor was given by the charter, to the mayor, burgesses, and commonalty, who were to choose the mayor *out of the burgesses*, and a bye-law directed, that the mayor and common-council, or the major part of them, of which the mayor was to be one, should elect *one of the common-council* to be mayor (*i*): it was held, that such bye-law was bad; because it was competent to a corporation to make such ordinances only as are for the better government of the corporation; and the present bye-law was prejudicial, inasmuch as it confined their choice; for, on the terms of the charter, they were at liberty to choose out of the burgesses at large. And *Lee, C. J.*, observed, that *a corporation could not alter the charter as to the persons eligible*, neither could they set up another government than the charter had prescribed (*j*). So a bye-law, *extending* the number of persons eligible, if it varies the constitution of the corporation as prescribed by the charter is bad (*k*). And upon the same principle, a bye-law directing that no person shall be elected mayor a second time within six years, has been held to be void (*l*). A bye-law made by a part of the corporation to deprive the rest of the right of electing, without their assent, is bad. Hence, where by the charter the power of electing common councilmen, was given to the mayor, jurats and commonalty, and a bye-law was made by the *mayor, jurats, and common-council*, restraining the election of common councilmen to the mayor, jurats, such of the commonalty as were of the common-council, and sixty others, who were senior common freemen; the bye-law was held to be bad (*m*). A bye-law cannot explain a doubtful charter; if there be any ambiguity on the face of the charter, it is the province of

(*h*) *R. v. Tucker*, E. 14 Geo. II., MS. Serjt. Hill, vol. 27, p. 184, Borough of Weymouth. Affirmed D. P. 1742.

(*i*) The charter contained a provision that the corporation might elect out of the burgesses twenty to be common-council. MS.

(*j*) *R. v. Phillips, Mayor of Carmarthen*, H. 22 Geo. II.; Trin. 22 & 23 Geo. II., MS.; and Bull. N. P. 211, *S. C.*, cited in 3 Burr. 1836, 1838, 1839. "This case was argued several times, and settled the point, that the number of the *eligible* cannot be narrowed, although on the authority of the case in 4 Rep. 78, the number of *electors* may." *Per Buller, J.*, in *R. v. Mayor of Cambridge*, *infra*; and see *ante*.

(*k*) *R. v. Bumstead*, 2 B. & Ad. 699. See *R. v. Attwood*, 4 B. & Ad. 481; 1 Nev. & M. 286.

(*l*) *R. v. Mayor of Cambridge*, H. 23 Geo. III., MS.

(*m*) *R. v. Cutbush, Common Councilman of Maidstone*, E. T. 8 Geo. III., 4 Burr. 2204. See also *R. v. Spencer*, 3 Burr. 1827, (the same corporation,) where a by-law excluding all the commonalty, except such as had served the office of churchwarden and overseer for one year, was held void; inasmuch as it super-added a qualification not required by the charter, and which had no relation to, or connection with, their corporate character or capacity.

the court to expound it (*n*). A bye-law which gives a voice in the election to any person to whom it was not given by the constitution of the borough, is bad (*o*). It remains only to observe, that a bye-law may be good in part, and bad in part, provided the two parts are entire and distinct from each other (*p*). Although there do not remain any traces of a bye-law in the corporation books, and although there cannot be any proof given of the loss of it, yet, upon evidence of constant usage, a jury may be directed to presume its existence (*q*); for it is an "invariable principle that, when we find a very ancient usage, we are to presume anything which will support it" (*r*). Sixty years' usage has been considered as evidence of a bye-law (*s*).

VI. Of the Inspection of the Records of the Corporation.

Every member of the corporation has, as such, the right to inspect the books belonging to the corporation for any matter that concerns himself, although the corporation are not parties to the dispute which renders the inspection necessary; but the court will not grant the rule generally, but only to inspect the particular book in which the information sought for is to be found (*t*). The 35th section of the Municipal Corporation Act (*u*) directs that, when councillors are elected, "the mayor shall cause the voting-papers to be kept in the office of town-clerk during six calendar months at the least after every such election; and the town-clerk shall permit any burgess to inspect the voting-papers, on payment of 1s. for every search." Under the foregoing clause, the town-clerk is not compellable to allow two persons at once to inspect the voting-papers, or to give two of them to one person at the same time. But he is bound to allow any voter who brings a list of his own to compare it with the papers produced by the town-clerk, and mark it according to what he finds there (*x*). In an action for the breach of a bye-law restraining persons from exercising trades within the limits of a corporate city, unless they become freemen, the court would compel the corporation to allow the defendant to inspect the bye-law in the corporation books (*y*). But now, by the Municipal

(*n*) *R. v. Tucker*, E. 14 Geo. II., B. R., MS.

(*o*) *R. v. Bird*, 13 East, 387.

(*p*) *Adm. per Lord Kenyon*, C. J., in *R. v. Fishermen of Faversham*, 8 T. R. 356.

(*q*) *R. v. Powell*, 3 E. & B. 377.

(*r*) *Per Coleridge*, J., 3 E. & B. 389. See *R. v. Head*, 4 Burr. 2518, and *R. v. Bird*, 13 East, 368, where defendants pleaded a bye-law not now extant in writing.

(*s*) *Per Lord Mansfield*, C. J., in *Perkin v. Master, Warden, &c. of the Company of Cutlers in Hallamshire, in the County of York*, 21 MS., Serjeant Hill, p. 65.

(*t*) *R. v. Hostmen*, in N. upon T. Str. 1223. And see *R. v. Merchant Taylors' Company*, 2 B. & Ad. 129, ante, p. 1034.

(*u*) 5 & 6 Will. IV. c. 76.

(*x*) *Per Cur.*, *R. v. Arnold*, 4 A. & E. 663.

(*y*) *Harrison v. Williams*, 3 B. & C. 162.

Corporation Act (sect. 14), notwithstanding any custom or bye-law, every person in any borough may keep any shop for the sale of all lawful wares and merchandizes by wholesale or retail, and use every lawful trade, &c., for hire, gain, sale, or otherwise, within any borough.

VII. *Of the Pleadings.*

A *quo warranto* being in the nature of a writ of right, the defendant cannot plead any plea, except to justify or disclaim (z). Hence, he cannot plead not guilty (a). In like manner, he cannot plead *non usurpavit*, or that he did not usurp the office in question (b). This appears from the nature of the charge, which calls on the defendant to show by what authority he exercises the office, to which charge the pleas of not guilty and *non usurpavit* do not afford an answer. The plea of limitation of time under st. 32 Geo. III. c. 58, may be pleaded either singly or together with such plea as might lawfully have been pleaded before the passing of that act, or such several pleas as the court, on motion, shall allow; and if, upon the trial of such information, the issue joined upon the plea aforesaid shall be found for the defendants, or any of them, he or they shall be entitled to judgment, and to such costs as they would by law have been entitled to if a verdict and judgment had been given for them upon the merits of their title. The second section of the above statute provides, that the prosecutor may reply a forfeiture, surrender, or avoidance by the defendant of the office or franchise happening within six years before exhibiting of the information, whereon the defendant may take issue, and shall be entitled to costs in manner aforesaid. The defendant is entitled by leave of the court to plead several pleas, under sect. 1 of the above statute, although the limitation of time does not form the subject of one of his pleas (c). Where the plea consists of several facts, from which the defendant infers that he is entitled to the office, the replication may contain a denial of any of the facts stated in the plea; but if it contain merely a denial of the inference drawn by the defendant from those facts, it will be bad; for that amounts merely to a denial of the law; for the judges are to determine whether the inference drawn by the defendant is fairly drawn (d). In an information against the defendant for usurping the office of portreve, defendant showed a title, and concluded his plea, "and so he says that he did not usurp in manner and form as in the said information is alleged;" the coroner replied,

(z) *Per Holt*, C. J., 12 Mod. 225.

(a) *Ibid.*

(b) *Queen v. Blagden*, 10 Mod. 296.

(c) *R. v. Autridge*, 8 T. R. 467. See

further, *ante*, p. 1129.

(d) This applies equally to proceedings arising on mandamus (see *ante*, p. 1040) and to pleadings in ordinary actions.

that he did usurp in manner and form, &c. The replication was adjudged to be bad (*e*).

VIII. *Evidence.*

Corporation books are generally allowed to be given in evidence, when they have been publicly kept as such, and the entries made by the proper officers (*f*); not but that entries made by other persons may be good, as if the town-clerk be sick, or refuse to attend; but then the circumstances under which the entries have been made must be proved. Corporation books being of a public nature, examined copies of the entries therein may also be given in evidence: and consequently the court will not enforce the production of the original books, unless it appear to be necessary that they should be inspected on account of a rasure, new entry, or the like, which must be verified by affidavit (*g*). An entry in the public books of a corporation, is not evidence for them unless it be an entry of a public nature (*h*). The deed of a corporation cannot be given in evidence, without some evidence that the seal affixed to it is the seal of the corporation. It is not necessary to prove the seal of a corporation in the same manner as the seal of an individual, by producing the witness who saw the seal affixed; but when an instrument having a seal affixed to it, purporting to be a corporate seal, is produced in evidence, it is necessary to prove that the seal is the seal of the corporation, if there be any doubt about it, otherwise any instrument with a seal to it might be produced in court as an instrument sealed by the corporation (*i*).

In *quo warranto* for exercising the office of mayor, upon issue joined, that H., the presiding officer at defendant's election, was not then mayor; the title of H. to be mayor, and not merely whether he was mayor *de facto*, is put in issue; and evidence was held to be admissible, to show, that H. had not been lawfully elected; H. being then dead, but, before his death, an information having been filed against him for usurping the office (*j*). A regular usage for twenty years, unexplained and uncontradicted is sufficient to warrant a jury in finding an immemorial custom (*k*). A custom for the steward of a court-leet to nominate certain persons to the bailiff, to be summoned on the jury, is a good custom (*l*).

(*e*) *R. v. Portreve of Honiton in Devonshire*, E. 1 Geo. I., MS.

(*f*) *Per Cur.*, *R. v. Mothersell*, 1 Str. 93.

(*g*) *Brocas v. Mayor, &c. of London*, 1 Str. 307.

(*h*) *Marriage v. Lawrence*, 3 B. & A. 142.

(*i*) *Per Lawrence, J.*, *Moises v. Thornton*, 8 T. R. 307.

(*j*) *R. v. Smith*, 5 M. & S. 271. But see 7 Will. IV. & 1 Vict. c. 78, s. 1, *ante*, p. 1121.

(*k*) *R. v. Jolliffe*, 2 B. & C. 54.

(*l*) *Ibid.*

A judgment of ouster may be given in evidence to prove the ouster of a third person, by whom the defendant was admitted. In a *quo warranto* to try defendant's right to be a bailiff of Scarborough (*m*); in setting out his right, he showed his own election under Batty and Armstrong, two former bailiffs, alleging, that at the time of his election they were bailiffs. Among many other issues the coroner took this, that Batty and Armstrong were not bailiffs, as alleged in the plea. The proof of this issue lying upon the defendant, he gave general evidence of the election and right of Batty and Armstrong. And to encounter that, the prosecutor gave evidence of the custom of the borough of electing bailiffs, and produced a record whereby judgment of ouster was given against Batty and Armstrong, to remove them from the office as not being duly elected to it. And it being objected on the trial, that this record ought not to be read against the defendant, and the judge having allowed it to be read, and left the whole evidence on both sides to the jury, to consider whether these persons were bailiffs or not, and the issue being found for the king, defendant moved for a new trial; 1st, because this record was *res inter alios acta*, to which the defendant was neither party nor privy, and so *illi nocere non debuit*: although the judgment should have been obtained by default, misleading ignorance of their case, or even by collusion, as the defendant was a stranger to it, he by law could not be let in to prevent any of those inconveniences, and therefore it ought not to have been admitted as any evidence against him, but, in the trial of his right, should have been totally rejected. 2ndly. That the instances where records between other parties have been read, are, in cases of general customs, as in the *City of London v. Clerke*, Carth. 181, where, in a demand of toll, verdicts against other persons were read against the defendant, and were undoubtedly good evidence, amounting to no more than payment of the toll by strangers, which is always allowed as evidence to prove a custom. But, in this instance, the record was read to a single fact, *viz.* the election, which the law does not allow. *Lock v. Norborne*, 3 Mod. 141; where it is expressly laid down, that none can be bound by a verdict against another that is not party or privy to it; as the heir of the ancestor, or the like. 3rdly. That this record, as read, must necessarily be conclusive evidence, and could not by law be left to the jury, as a matter that they could find against. Records are of so high a nature, that there can be no averment, much less parol proof admitted against them: and, therefore, to say that the whole evidence was left to the jury, was impossible; and the rather, because the credit of a record ought not, in any case, to be submitted to them. On the other side were cited Trials per Pais, 206; Skinn. 15, *Brownker v. Sir Robert Atkins*, where a nonsuit against a predecessor in the same office was read against a successor, because

he came in privy, as an heir under an ancestor. So in *Rumball v. Norton*, upon a traverse to the return of a mandamus, to swear plaintiff a Burgess of Calne, on *non fuit electus*, a judgment of ouster against one of the plaintiff's electors was given in evidence against the plaintiff. So Mich. 13 Geo. I., the *King v. Bulcock*, on a trial of *quo warranto* to try defendant's right to be a mayor of Southampton a judgment of ouster against his predecessor was read against him. Besides, it was objected, that several other material issues were found against the defendant; and, therefore, though this evidence ought not to have been given, yet the party ought not to have a new trial. *Per Cur.* This evidence seems to have been rightly admitted. The defendant has made the title of Batty and Armstrong part of his right; and if he gives evidence of the right of their election, can that be better disproved than by a judgment of ouster, wherein such election is declared to be void? Indeed, this evidence was not of itself conclusive, but might have been repelled by proving fraud, neglect, or any other circumstance which would have abated the weight of the judgment. And if anything of that kind had appeared, the force of it, as to the defendant, would have been greatly lessened. But what makes this case still plainer is, that defendant, by his plea, makes title under, and takes upon himself to justify, their election; and therefore ought to be bound by what has been transacted by them. And if this evidence had been erroneously admitted, yet here are many more issues found against him, to which no objection is made; and being any of them sufficient to entitle the crown to a judgment of ouster against defendant, there is no colour to grant a new trial on this point. And for these reasons it was denied. But although a judgment of ouster against one corporator is admissible against another, deriving title through him, it is not conclusive (n). The insertion of the name of a town in schedule (A.) of the Municipal Corporation Act, is *prima facie* evidence of the existence of a municipal corporation there, but may be rebutted by evidence, that the name had been inserted in the act by mistake; as in the case of Gateshead (o).

IX. Judgment.

By 9 Ann. c. 20, s. 5, it is enacted and *declared*, That in case any person, against whom any information, in the nature of a *quo warranto*, shall be exhibited in any of the said courts (p), shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or fran-

(n) *R. v. Grimes*, 5 Burr. 2598.

(o) *R. v. Greene*, 1 Nev. & P. 631.

(p) Court of King's Bench, courts of

sessions of counties palatine, or courts of grand sessions in Wales, now abolished by 11 Geo. IV. & 1 Will. IV. c. 70.

chises, it shall be lawful for the said courts respectively, as well to give judgment of *ouster* against such person from any of the said offices or franchises, as to fine such person for usurping, &c. any of the said offices or franchises; and the said courts respectively may give judgment, that the relator shall recover his costs of such prosecution: and if judgment shall be given for the defendant, in such information, he shall recover his costs against such relator; such costs to be levied in manner aforesaid. In an information against defendant for exercising the office of mayor of Penryn, it appeared, that by the letters patent of incorporation it was directed, that the mayor elect, before he should be admitted to execute his office, should take a corporal oath, before the last mayor, for the faithful execution of his office. The defendant pleaded, that he was elected and duly sworn mayor; and issue being taken in the replication, both as to his being elected and sworn, upon the trial, the jury found that he was elected, but that he was not sworn; and thereupon judgment of ouster was given in B. R. (q). Upon writ of error brought in D. P., it was insisted, that the judgment was erroneous; for it appeared upon the record, that his right to the office was established by the verdict, which found that he was elected; and yet, whilst this judgment of ouster stood, the plaintiff could not have the effect of a mandamus to be sworn in, though the legality of his election was not disputed, and though no time was limited by the charter for his being sworn in, nor was he by law debarred from having such mandamus, although he acted before he was sworn in. For the defendant, in error; it was contended, that it being expressly required by the charter of incorporation, that the mayor elect should take the oath of office before he should be admitted to execute such office, it became necessary for the plaintiff, in order to make his justification complete, to allege, that he did accordingly take such oath; and this allegation having been falsified by the verdict, the justification, being entire, was destroyed, and he was found to be an usurper, and consequently subject to the judgment of ouster, as being the only legal judgment in this case. The judgment of the Court of King's Bench was affirmed (r). In a subsequent term, viz. E. 11 Geo. I., Str. 625, Pindar having applied for a mandamus to swear him into the office to which he had been elected, the court refused to grant it, in consequence of the judgment of ouster, which, according to the opinion of *Raymond*, C. J., did away the election; and he thought, that, without a new election, since the judgment, the party was not entitled to a mandamus. In this case, Lord *Raymond*, *Powys* and *Fortescue*, JJ., concurred in the propriety of the absolute judgment of ouster, which had been given in the former case; *Raymond*, C. J., observing, that he

(q) *R. v. Pindar*, cited *per Our.*, Lord Raym. 1447; Str. 582, S. C., case of the Mayor of Penryn.

(r) 2 Bro. P. C. 294, Tomlins' edit.

The judgment was affirmed *without costs*; the judges having delivered it as their opinion, that costs were not recoverable in this case.

believed no precedent could be shown, where the judgment was ever entered in any other manner. And *Fortescue*, J., added, that a *quo warranto* was the king's writ of right, and as against the crown want of swearing in was as much as want of an election; the jury, therefore, having found in effect, that he had no title to the office, it was of course, that he should be excluded from it by the judgment of the court. He remarked, also, that he had never heard of any other judgment, and that it was reasonable to exclude a person who appeared to have no title. *Reynolds*, J., however, expressed an opinion, that there ought properly to have been a judgment of ouster, *quousque*, only, upon the finding of the jury, in *R. v. Pindar*. And in the case of *R. v. Clarke*, 2 East, 75, who having been ill sworn in, had afterwards disclaimed upon an information filed against him for usurping the office; and though having submitted to a judgment of complete ouster, he was held to be concluded from setting up again his original right, yet Lord *Kenyon* intimated, that there might have been a judgment *quousque* only against him. The same point was again agitated in *R. v. Courtenay*, 9 East, 246; the court, however, being of opinion, that the defendant had been well elected and sworn in, were not required to pronounce any opinion as to the nature of the judgment; but they said that, after diligent search, they could not find, upon the files of the court, any precedent of a judgment of ouster *quousque*. In the case of *The King v. Biddle*, Str. 952, the defendant confessed an usurpation during part of the time charged in the information; and from that time insisted on an election. The prosecutor having entered up judgment of ouster; the court ordered, that all the judgment, except that of *capiatur pro fine*, might be expunged, observing, that it would be hard that a subsequent good election should be done away, as it would be by the judgment of ouster. And they distinguished it from *Pindar's* case, where the party had been guilty of an usurpation during all the time charged in the information. A *quo warranto* information alleged that there was a town called Bala, and that the defendant without right exercised the office of mayor of the town, and together with two other persons, the powers and privileges of a body corporate, by the name and description of the mayor and bailiffs of the borough of Bala; the defendant let judgment go by default, whereupon judgment of ouster was entered up, with costs to the relator. It was held, that the relator was entitled to costs under the 9 Ann. c. 20, s. 5, as on this record it must be taken against the defendant that the office with which he was charged with assuming was a corporate office in a corporate place (s). A *quo warranto* information has, of late years, been considered merely in the nature of a civil proceeding; and consequently the court will grant a new trial (t). The office

(s) *Lloyd v. Reg.*, 31 L. J., Q. B. 209,
in error.

(t) *R. v. Francis*, 2 T. R. 484.

of registrar and clerk of the Court of Requests, at Bristol, which was created by statute, is not an office within the meaning of 9 Ann. c. 20: and, therefore, although judgment had been given for the defendant upon a *quo warranto* for using that office; yet it was held, that he was not entitled to costs ^(u). So in a case relating to the office of bailiff (the returning-officer), in a borough sending burgesses to parliament, but not a town corporate ^(x).

^(u) *R. v. Hall*, 1 B. & C. 237.

M'Kay, 5 B. & C. 640.

^(x) *Borough of Stockbridge, R. v.*

CHAPTER XXXIII.

REPLEVIN.

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I. *In what Cases a Replevin may be maintained.*

It is said in 3 Bl. Com. 146, that replevin “obtains only in one instance of an unlawful taking, that of a wrongful distress,” and Lord Coke’s opinion, 1 Inst. 145 *b*, is to the same effect. Lord Redesdale, indeed (*a*), said, that this definition of replevin was too

(*a*) *Shannon v. Shannon*, 1 Sch. & Lef. 327.

narrow, and that many old authorities were to be found in the books, of a replevin having been brought where there was no distress (*b*). It seems, however, that the learned commentator's more qualified definition is the more correct, and at all events it is clear that replevin is not maintainable, unless in a case where there has been first a taking out of the possession of the owner (*c*). The writ of replevin "is merely meant to apply to this case, *viz.*, where A. takes goods wrongfully from B., and B. applies to have them redelivered to him upon giving security, until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods in which B. claims a property, this is not the writ to try that right" (*d*).

The writ, as was further remarked by Lord *Redesdale* (*e*), is founded on a taking, and the right which the party, from whom the goods are taken, has to have them restored to him, until the question of title to the goods is determined. The person who takes them may claim property in them; and if he does, the [sheriff] cannot deliver the goods until the question is tried; but this claim of property can be made only when there has been a taking; and it appeared to him that the writ of replevin was calculated in such cases to supply the place of detinue or trover, and to prevent the party from whom the goods were taken being put to those actions, except in cases where the other could show property. A replevin lies for goods and chattels only (*f*), hence it cannot be maintained for things affixed to the freehold (*g*).

Although, generally speaking, wherever there is a distress, replevin may be maintained, yet this rule is not universally true; for it appears from *R. v. Monkhouse*, 2 Str. 1184, that the court directed an attachment to be issued against an [under-sheriff] for granting a replevin of goods distrained on a conviction for deer-stealing. So a replevin will not lie upon a distress made for a duty to the crown (*h*); or for goods taken in execution (*i*). So where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the quarter sessions; and replevin does not lie for a distress under such a rate; for, being an inhabitant, he is within the jurisdiction of the justices, and the rate is a question of amount for the sessions (*k*).

But where there is an entire want of jurisdiction, it is otherwise (*l*). Where the plaintiff brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the then Highway Act (13 Geo. III. c. 78, s. 47),

(*b*) See the cases cited *ibid. in notis*; Bull. N. P. 52; and *Allen v. Sharp*, 2 Exch. 352.

(*c*) *Mennie v. Blake*, 6 E. & B. 842.

(*d*) *Per* Lord *Redesdale*, Ch., *Re Wilsons*, 1 Sch. & Lef. 320, n.

(*e*) *Shannon v. Shannon*, 1 Sch. & Lef.

327.

(*f*) 1 Inst. 145, b.

(*g*) *Niblet v. Smith*, 4 T. R. 504.

(*h*) *R. v. Oliver*, Bunb. 14.

(*i*) *Willes*, 672, *in notis*.

(*k*) *Marshall v. Pitman*, 9 Bing. 595.

(*l*) *Milward v. Caffin*, 2 Bl. R. 1330.

on the ground that the premises, for which he was assessed, were situate without the township which was liable to repair the road, the court refused to set aside the proceedings (*m*). So where some poor-rates had not been duly published on the Sunday following the allowance, according to 17 Geo. II. c. 3, s. 1, and a warrant of distress issued for a single sum made up of these rates and of others which were regular; it was held, that the warrant did not justify the distress; and the replevin which had been brought for taking cattle under the warrant was sustained, although it was objected, that the plaintiff should have appealed (*n*). So where a party was assessed to the poor-rate for premises which he occupied, and other distinct premises which he did not occupy, and his goods were distrained for the several rates jointly (*o*). And replevin will lie where goods have been taken under an improper conviction (*p*). Replevin also lies in the case of goods taken under a warrant of distress issued by a justice to enforce payment of the costs ordered on an appeal against a poor-rate under 12 & 13 Vict. c. 45, s. 5, & 11 & 12 Vict. c. 43, s. 27 (*q*).

II. Of the Proceedings in Replevin.

At the common law the proceedings in replevin commenced with suing out of Chancery a writ of replevin directed to the sheriff. This writ was in the nature of a *justicies*, not returnable, and gave the sheriff a judicial authority to determine, in his county court, the matter in question between the parties (*r*). This proceeding being found to be attended with delay, the 52 Hen. III. (the Statute of Marlebridge), c. 21, enacted, that if the beasts (*s*) of any person were taken and detained, the sheriff, *after complaint made to him*, might deliver them, &c. This statute was held to extend to goods distrained for a poor-rate (*t*); and under it the sheriff might hold plea in replevin by plaint of any value, and make replevin immediately (*u*). This proceeding by plaint entirely supersedes the old method of proceeding by writ; and

(*m*) *Fenton v. Boyle*, 2 N. R. 399.

(*n*) *Sibbald v. Roderick*, 11 A. & E. 38.
See *Skingley v. Surridge*, 11 M. & W. 503.

(*o*) *Governor of Bristol Poor v. Wait*, 1 A. & E. 264.

(*p*) *George v. Chambers*, 11 M. & W. 149.

(*q*) *Gay v. Matthews*, 32 L. J., Q. B. 69; 4 B. & S. 440, in error. The 24 Geo. II. c. 44, s. 6, as to no action being brought against a constable acting in obedience to a warrant till demand of a copy and refusal, and the 2 & 3 Vict. c. 93, s. 8, and the 1 & 2 Will. IV. c. 41, s. 19, which require a month's notice of action to be given to any constable for anything done in execution of his office do not apply to an action of Replevin. *S.C.*

(*r*) 2 Inst. 140.

(*s*) The word in the statute is "averia," "beasts;" but it was usual for the sheriff to replevy other goods and chattels as well.

(*t*) *Sabourin v. Marshall*, 3 B. & Ad. 440.

(*u*) 1 Inst. 145, b.; 2 Inst. 139. This position, in 2 Inst. 139, is not warranted by 21 Edw. IV. c. 66, there referred to. But it is said in Broke, Repl. pl. 46, to be the best opinion. The reason assigned for it by Sir *Edw. Coke*, is, "that it would militate against the scope of the statute, that the owner of the beasts should be deprived of the use of them, until the day on which the county court is holden."

still further to facilitate it, the 1 & 2 Ph. & M. c. 12, s. 3, provided for the appointment and proclamation by the sheriff of deputies (*x*) (commonly called replevin clerks), to make replevins in his name in the same manner that he might have done (*y*).

By the 119th section of the 9 & 10 Vict. c. 95, the *action* of replevin in the district courts, constituted under that act (New County Courts), is substituted "in cases of distress for rent in arrear and damage feasant," for the proceedings formerly held in the Sheriff's County Court, and the jurisdiction of the sheriff to hear and determine replevin suits in those cases was taken away. But it was held to be still his duty to make replevins, appoint replevin-clerks, take bonds, &c. (*z*). By the 19 & 20 Vict. c. 108, s. 63, "the powers and responsibilities of the sheriff with respect to replevin bonds shall henceforth cease, and the registrar of the County Court of the district in which *any* distress, subject to replevin, shall be taken, shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto; and such process shall be executed by the high bailiff." Under these acts the county court has jurisdiction to try an action of replevin, although title is in question, s. 58 of 9 & 10 Vict. c. 95, not applying to an action of replevin (*a*).

It should be observed that, although the words of the above-mentioned section are quite general and very comprehensive, the act does not in terms repeal the 52 Hen. III. c. 21, or the 1 & 2 Ph. & M. c. 12, s. 3. On the contrary, it is provided (by sect. 3 of the 19 & 20 Vict. c. 108), that that act and the 9 & 10 Vict. c. 95, shall be read and construed as one act. The last-mentioned act, transferring the action of replevin from the old to the new county courts, is expressly confined to replevins in cases of distress for rent arrear and damage feasant; and by section 4 of that act, "for all purposes except those which shall be within the jurisdiction of the courts holden under that act the (old) county court shall be holden as if that act had not been passed." But by s. 22 of C. L. P. Act, 1860, the provisions of the 19 & 20 Vict. c. 108 which relate to replevin are extended to all cases of replevin.

By the 64th section of the 19 & 20 Vict. c. 108—The registrar of the county court shall, at the instance of the party whose goods shall have been distrained, cause the same to be replevied to such party on his giving the security mentioned in the two succeeding sections.

By section 65—An action of replevin may be commenced in any

(*x*) See *Bowdon v. Hall*, 4 Q. B. 840.

(*y*) In an action on a replevin bond (*Falkner v. Johnson*, 1 D. & L. 346), or against the sheriff for taking insufficient sureties (*Plumer v. Briscoe*, 11 Q. B. 46), proof that the replevin clerk acted as

such was held to be sufficient *prima facie* evidence that he was so.

(*z*) *Edmonds v. Challis*, 6 D. & L. 581.

(*a*) *Fordham v. Akers*, 4 B. & S. 578; 33 L. J., Q. B. 67.

superior court in the form applicable to personal actions therein, provided the plaintiff gives security that he will prove (*inter alia*) that "he had ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question, or that such rent or damage exceed 20*l*."

By section 67—Any action of replevin brought in a county court shall be removed into any superior court by writ of *certiorari* if the defendant shall apply to such superior court or a judge there (*qy.* thereof) for such writ, and shall give security, &c. And every such superior court shall have power to determine the same action.

III. Of the Replevin Bond and Action thereon.

The replevisor must, whether he intend to commence an action in a superior or in the county court, give security, to be approved of by the registrar (19 & 20 Vict. c. 108, ss. 65, 66); and the defendant, in cases removed from the county court by *certiorari*, must give security, to be approved of by the master; sect. 67. This security is in the form of a bond with sureties; sect. 70 (*b*). It would seem, however, that one surety is sufficient; for it was held, under the stat. Westm. 2 (13 Edw. I.) c. 2, which directed the sheriff to take pledges (which is synonymous with sureties, 1 Lord Raym. 278), that it was sufficient if he took one (*c*): *i. e.* in cases other than those of distresses for rent, in which, by the 11 Geo. II. c. 19, s. 23, two sureties were expressly required; but this section is now, it seems, impliedly repealed by the above act.

Formerly the security was taken to the sheriff, and either he or his assignee, by virtue of the 11 Geo. II. c. 19, s. 23, might sue upon it (*d*). But by 19 & 20 Vict. c. 108, s. 70, the security is to be taken "to the other party or intended party in the action or proceeding." But where it was taken by mistake to the judge, and an action was brought upon it in his name as trustee for the party, it was held, that the bond was not invalidated, and that the plaintiff was entitled to recover (*e*). The bond is generally a joint and several bond by the replevisor and the surety or sureties (*f*). But a bond by the replevisor alone is, it seems, lawful; and if the condition be not performed, an action may be brought on it (*g*). The security, in the case of the plaintiff in replevin, is to be taken "for such an amount as the registrar shall deem sufficient to cover the alleged rent or damage, in respect of which the distress shall have been made," and the probable costs of the cause in the superior or county court respectively; sects. 65, 66. In the case

(*b*) If the registrar neglect to take a bond, according to the directions of the statute, the courts will not, it seems, grant an attachment against him. *Twells v. Colville*, Willes, 375; *R. v. Lewis*, 2 T. R. 617.

(*c*) *Hucker v. Gordon*, 1 C. & M. 58.

(*d*) *Thompson v. Farden*, 1 M. & G. 535.

(*e*) *Stansfield v. Hellawell*, 7 Ex. 373.

(*f*) See Chitt. Forms, 571 (7th edit.).

(*g*) *Blackett v. Crissop*, 1 Lord Raym. 278.

of the removal of the cause by the defendant into the superior court, the security is to be taken "for such amount, not exceeding 150*l.*, as the Master shall think fit;" sect. 67.

The condition of the bond varies according as the suit was commenced in the superior or county court. In the first case, the bond is conditioned "to commence an action of replevin against the distrainer in such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect and without delay, and, unless judgment thereon be obtained by default, to prove before such superior court, that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods if a return thereof shall be adjudged." In the second case it is conditioned "to commence an action of replevin against the distrainer, in the county court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods if a return thereof shall be adjudged." In the case of the action being removed by the defendant by *certiorari* the condition of the bond to enable him to do so is "to defend such action with effect, and, unless the replevisor shall discontinue or shall not prosecute such action or become nonsuit therein, to prove before such superior court, that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair or franchise was in question, or that the rent or damage, in respect of which the distress shall have been taken, exceeded 20*l.*" (*h*).

"To prosecute with effect, the plaintiff must not only proceed to a decision of the suit, but must have success in it, or he does nothing; and it is not a completion of the condition to have levied a plaint in the county court: for the words extend to all the proceedings, from the original to the conclusion of the action, as well in the court below as in the superior court" (*i*). *Per Lee*, C. J. "The failure of prosecuting the suit with success is, we think, a failure of prosecuting the same with effect." *Per Holroyd*, J. (*k*). "Such a condition binds a party to prosecute, not only in the court where the suit was originally commenced, but in every other court into which the cause may be removed in due course of law." *Per Coltman*, J. (*l*). Even where the bond was given under sect. 121 of the 9 & 10 Vict. c. 95, on the removal of the cause into the superior court by the defendant, to whom the words "*prosecute with effect*" are not so applicable, the words were held to have the

(*h*) See *Short v. Hubbard*, 2 Bingh. 249.

(*i*) 19 & 20 Vict. c. 108, ss. 65, 66, 67.

(*k*) *Perreau v. Bevan*, 5 B. & C. 300.

(*l*) *Edmonds v. Challis*, 6 D. & L. 595.

same meaning, and the bond was held to be forfeited if the obligor did not succeed (*m*). But under the 19 & 20 Vict. c. 108, s. 67, the condition of the bond, where the cause is removed by the defendant, is now different; see *supra*. So where the condition of the replevin bond was, to appear in the county court and *then* and *there* to prosecute with effect; it was held, that the words *then* and *there* related to so much of the prosecution as should be in the county court, but that they did not restrain it, and that the bond was forfeited, the plaintiff having been nonsuited in the superior court, to which the cause had been removed (*n*).

Plaintiff in replevin having given a bond to prosecute his suit with effect, levied a plaint against the defendant, who obtained an injunction to stay proceedings until a certain day, on which the plaintiff in replevin died; it was adjudged, that the plaintiff had prosecuted his suit with effect, there not having been either a nonsuit or a verdict against him; and *Holt*, C. J., compared it to the case of a recognizance on a writ of error, which was to prosecute with effect; there, if the plaintiff was not nonsuit, nor the judgment affirmed, the recognizance was not forfeited (*o*). But where the breach assigned was, that defendant did not appear at the next county court, and *then and there* prosecute his suit with effect, *i. e.* to a successful termination (which is the meaning of the words "with effect"): it was held, ill assigned; for it is consistent with the averments in that breach, that the suit might have been begun at the first county court, and be still pending (*p*).

A plaintiff in replevin, who does not use due diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined (*q*). Where the defendant had permitted two years to elapse without taking any steps in the replevin cause; it was held, that the bond was forfeited, and that the obligee might recover, although he had not signed any judgment of *non pros.* in the county courts (*r*). The condition to prosecute without delay may be broken by a delay which does not exceed the time allowed by the ordinary practice in the courts, *e. g.* by a delay in declaring, if the defendant in replevin be unduly prejudiced thereby (*s*).

"In all replevin bonds there are several *independent* conditions, one to prosecute, another to return the goods replevied, &c., and a breach may be assigned upon any one of these distinct conditions." *Per Lee*, C. J. (*t*). Or the breach may be assigned thus: "that defendant did not prosecute his suit with effect, and hath not

(*m*) *Tummons v. Ogle*, 6 E. & B. 571.

(*n*) *Vaughan v. Norris*, Ca. Temp. Hardw. 137.

(*o*) *Duke of Ormond v. Bierly*, Carth.

519.

(*p*) *Jackson v. Hanson*, 8 M. & W. 477;

Morris v. Matthews, 2 Q. B. 293, *acc.*

(*q*) *Harrison v. Wardle*, 5 B. & Ad. 146.

(*r*) *Axford v. Perrett*, 4 Bingh. 586.

(*s*) *Gent v. Cutts*, 11 Q. B. 288.

(*t*) In *Morgan v. Griffith*, 7 Mod. 380.

made a return" (*u*). The breach assigned in the declaration ought to pursue the condition of the bond; but it is not necessary that it should extend any further (*x*).

To an action for not prosecuting the suit with effect, it is sufficient to plead that the party appeared at the next county court, and there prosecuted the suit according to the form and effect of the condition, and that the suit is still depending and undetermined (*y*). But any rule, practice, &c., of the county court, discharging or rendering unnecessary the appearance of the defendant, should be pleaded (*z*). Proof that a replevin suit was struck out by the county court judge on the ground of want of jurisdiction, does not support an allegation of a breach to prosecute with effect (*a*).

"The liability of the sureties in a replevin bond is the amount of rent proved to be in arrear at the time of the distress, and the costs of the replevin suit to the amount of the penalty in the replevin bond" (*b*), and costs of suit in the action thereon (*c*). Although the bond be executed by one of the sureties only, it is still available against such surety (*d*). The sureties will not be discharged by the execution of a writ of inquiry under the 17 Car. II. c. 7, s. 2, and judgment thereon for the avowant, to recover the arrears of rent found, together with a sum for his costs and damages (*e*). *Secus*, it seems, if execution has issued and the sum recovered has been levied and paid to the avowant before action commenced against the surety, *S. C.* Where the replevin suit was, without the privity of the sureties, referred to an arbitrator under an order at *nisi prius*, and he enlarged the time for making his award, a plea by the sureties, setting forth those facts, was held bad; for there can be no discharge of the condition of a bond except by writing under seal (*f*). But such facts would entitle the sureties to have the proceedings set aside on a summary application to the equitable jurisdiction of the court (*g*). It is no objection to an action against the sureties on the bond in the superior courts, that the replevin suit has not been removed out of the county court (*h*).

When the defendant has obtained judgment for a return, if the sheriff return to the writ *de retorno habendo*, that the cattle are eloigned, the defendant may, it seems, if no security has been taken or money deposited (*i*), or if the security taken or money

(*u*) *Phillips v. Price*, 3 M. & S. 180; but see *Perreau v. Bevan*, 5 B. & C. 300.

(*x*) 5 T. R. 195.

(*y*) *Brackenbury v. Pell*, 12 East, 585; *Edmonds v. Challis*, 7 C. B. 413.

(*z*) *Rider v. Edwards*, 3 M. & G. 202.

(*a*) *Tubby v. Stanhope*, 5 C. B. 790.

(*b*) *Per Alexander*, C. B., *Ward v. Henley*, 1 Y. & J. 295.

(*c*) *Hefford v. Alger*, 1 Taunt. 218.

(*d*) *Austen v. Howard*, 7 Taunt. 28.

(*e*) *Turnor v. Turner*, 2 B. & B. 107.

(*f*) *Aldridge v. Harper*, 10 Bingham 118. But see *ante*, p. 497.

(*g*) *Archer v. Hale*, 4 Bingham 464.

(*h*) *Dias v. Freeman*, 5 T. R. 195.

(*i*) Under sect. 71 of 19 & 20 Vict. c. 108.

deposited be insufficient, maintain an action on the case against the registrar of the county court (*k*); and it is no answer in his mouth to say, that the replevisor, who was also a party to the bond, was sufficient (*l*). By sect. 33 of the 9 & 10 Vict. c. 95, the high bailiff "shall be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers." But by 13 & 14 Vict. c. 61, s. 19, no action shall be brought against the high bailiff, or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the clerk and seal of the court, until demand has been made or left at his office by the intended plaintiff, his attorney or agent, in writing, signed by the party demanding the same, of a perusal and copy of the warrant, and until the same has been refused for six days after such demand; and if the demand be complied with, the high bailiff, whether sued separately or jointly with the clerk, will be entitled to a verdict on the production or proof of the warrant, notwithstanding any defect of jurisdiction or irregularity in the warrant. By 29 & 30 Vict. c. 14, s. 11, no more high bailiffs are to be appointed, but the registrars are to perform their duties.

In this action it was held, that, in cases of a distress for rent arrear, since the 11 Geo. II. c. 19, s. 23, which in those cases limited the responsibility of the sureties to double the value of the goods distrained, that sum was the measure of damages in an action against the sheriff (*m*); except where notice had been given to the sheriff of the plaintiff's intention to sue the sureties, in which case the costs of a fruitless action against the sureties might, perhaps, be recovered in addition (*n*). The above section is impliedly repealed by the 65th, 66th, & 67th sections of the 19 & 20 Vict. c. 108 (*ante*); but the principle of the above cases may still be applicable.

Some evidence must be given by the plaintiff of the insufficiency of the pledges, but very slight evidence is sufficient to throw the burthen of proof on the registrar (*o*). The registrar is not bound to warrant the sufficiency of the sureties; if they are apparently responsible, it is enough (*p*). But he is to exercise a reasonable discretion in deciding upon the sufficiency of the sureties. He is not bound to go out of the office to make inquiries; but if the parties are unknown to him he ought to require information, beyond their own statement, even on oath, as to their sufficiency. It is for the jury to decide whether he has exercised a reasonable discretion (*q*).

(*k*) *Rouse v. Patterson*, 7 Mod. 387.

(*l*) *Plumer v. Briscoe*, 11 Q. B. 46.

(*m*) *Evans v. Brander*, 2 H. Bl. 547;
Paul v. Goodluck, 2 B. N. C. 220.

(*n*) *Baker v. Garratt*, 3 Bingh. 56.

(*o*) *Saunders v. Darling*, Bull. N. P. 60.

(*p*) *Hindle v. Blades*, 5 Taunt. 225.

(*q*) *Jeffery v. Bastard*, 4 A. & E. 823.

IV. *By whom a Replevin may be maintained.*

To maintain replevin, the plaintiff ought to have either an absolute or special property in the goods in question vested in him at the time of the taking (*r*). There are two kinds of property,—a general property which every absolute owner has, and a special property; as goods pledged or taken to manure his lands, or the like,—and of both these a replevin lies. 1 Inst. 145, b. A mere possessory right is not sufficient (*s*). If the goods of a feme sole are taken, and she marries, the husband alone may sue the replevin; because the property is transferred by the marriage, and vested absolutely in the husband, so that he may release it: and, consequently, he may have an action in his own name to bring back the property (*t*). If the goods are taken *after* marriage, husband and wife ought not to join in the replevin; but if they do join in the action, and after verdict a motion is made on this ground in arrest of judgment, it will be presumed that the husband and wife were jointly possessed of the goods before marriage, and that the goods were taken before marriage; in which case the husband and wife might join (*u*). Executors may maintain replevin for the goods of the testator taken in his lifetime (*x*). Parties who have a joint interest in the distress may join in the replevin (*y*); but where the interest in the goods taken is several, there ought to be several replevins (*z*).

V. *Of the Pleadings.*

Declaration.—The venue must be laid in the county in which the distress was taken. By the 4th Pl. R., H. T. 1853, the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading. Provided, that, in cases where local description is now required, such local description shall be given. See further, on this point, *ante*, p. 453.

The place in which the distress was taken, technically termed the *locus in quo*, as well as the vill or parish, should be named in the declaration; because the right of caption may turn on the place, and the freehold may come in question (*a*). But it is not

(*r*) Bro. Repl. pl. 8, 20.

(*s*) *Per Cur.*, in *Templeman v. Case*, 10 Mod. 25.

(*t*) F. N. B. 69, K.

(*u*) *Bern v. Mattaire*, Ca. Temp. Hardw. 119. See *ante*, p. 249.

(*x*) Bro. Repl. pl. 59.

(*y*) 3 Hen. IV. 16, a.

(*z*) Bro. Abr. Repl. pl. 12; 1 Inst. 145, b.

(*a*) 2 Hen. VI. 14, u. But the omission is not demurrable. See *Bullythorpe v. Turner*, Willes, 476.

necessary to name the place where the distress was *first* taken ; it is sufficient for the plaintiff to name the place in which he finds the defendant in *possession* of the distress (*b*) ; for the law considers the distress as wrongfully taken in every place in which the defendant may have it in his custody. If the distress be taken in one county, and carried into another, the plaintiff may have replevin in either county, because it is a caption in every county into which the distress is taken by the defendant. F. N. B. 691 ; 1 Doct. Pla. 315. See also Bro. Repl. pl. 63. Hence, where the plaintiff declared of a taking in A., and the defendant pleaded *non cepit modo et formâ*, the plaintiff having proved that he found the cattle in the possession of the defendant in A., it was adjudged sufficient, although the defendant proved that he first took them in B., and was only driving them through A. to the pound (*c*).

If the defendant never had the goods in the place named in the declaration, *non cepit modo et formâ* seems a proper plea, where the defendant does not seek a return. The plaintiff declared for taking guns *in quodam loco vocat*, the Minories ; the defendant pleaded *non cepit modo et formâ*. At the trial, the plaintiff proved the taking at a place in Surrey ; upon which it was objected, that he had failed in proving his issue : to which *Pratt*, C. J., assented, observing, that where the defendant does not insist on a return, he may plead *non cepit modo et formâ*, and prove the taking to be at another place. The plaintiff was nonsuited (*d*). If the replevin be brought in an inferior court, the *locus in quo* must be alleged to be within the jurisdiction of the court (*e*). Where the close has not any name, it should be described by abuttals, or as in the occupation of I. S. (*f*).

With respect to the description of the goods taken, it is stated in some of the books as a rule, that the goods must be described in the declaration with such certainty, that the sheriff may make a re-deliverance of them (*g*). Replevin for taking *quandam parcell' linteï et quandam parcell' papyri* ; and verdict for the plaintiff. It was objected, in arrest of judgment, that the description was too general and uncertain ; that although it might be well enough in trover and trespass, yet it was ill in replevin ; because it was not a sufficient direction to the jury in assessing the damages, nor to the sheriff in re-delivering the goods : but *Parker*, C. J., observed, that the sheriff might require the defendant to show him the goods (*h*), and that it was a good return for the sheriff to make, "that no person came on the part of the defendant to show him

(b) *Per Chambre*, J., 2 B. & P. 481.

(c) *Walton v. Kersop*, 2 Wils. 354.

(d) *Johnson v. Wollmer*, Str. 507.

(e) *Quarles v. Searle*, Cro. Jac. 95.

(f) *Potten v. Bradley*, 2 Moo. & P. 78.

(g) See Bull. N. P. p. 53.

(h) This argument has frequently been urged, when exceptions in arrest of judgment have been made in actions of ejectment, for uncertainty in the description of the premises. See *Portman v. Morgan*, Cro. Eliz. 465 ; and *ante*, p. 682.

the goods" (*i*). So where in replevin for taking fourteen skimmers and ladles, and three pots and covers, an exception was taken in arrest of judgment, to the declaration, for uncertainty in the description, in not expressing how many of each sort were taken; the Court, adopting the reasons of *Parker*, C. J., in the preceding case, were of opinion, that the declaration was sufficient, and gave judgment for the plaintiff (*k*). But a declaration in replevin for taking "divers goods and chattels," was held insufficient (*l*).

Of the Pleas. In Abatement.—There is a difference between pleas in abatement in replevin, and in other actions, arising from the peculiar nature of the proceedings in replevin. In other actions, as actions of assumpsit, debt, or trespass, the plaintiff is not put in possession of anything until after judgment and execution thereon: as soon, therefore, as the writ or count is quashed, by a judgment for the defendant, on a plea in abatement the defendant is thereby restored to the same situation in which he was before the action was brought: but in replevin the mere quashing the writ or count does not afford the defendant complete redress, the plaintiff being in possession of the defendant's goods by previous delivery from the sheriff (registrar). To remedy this inconvenience, and to entitle himself to a return of the distress, the defendant must, to a plea of abatement in replevin, subjoin a suggestion in the nature of an avowry or cognizance. As this suggestion, however, is merely for the purpose of a return, the matter of it is not traversable (*m*). To the plea of *cepit in alio loco*, the defendant must add a suggestion of this kind, if he seeks a return (*n*).

General Issue.—The general issue in replevin is "*non cepit*," by which the property is admitted to be in the plaintiff, and the caption only put in issue. If the plaintiff take husband after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement (*o*).

Property.—The defendant may plead property in himself, in bar of the action (*p*): and this plea may conclude with a prayer for a return and damages (*q*). So property in a stranger may be pleaded in bar (*r*); and the conclusion of this plea, praying a return, is good (*s*), although not now, it seems, necessary (*t*). So it is a good

(*i*) *Kempster v. Nelson*, Pasch. 13 Ann., 5 Bac. Abr. 90.

(*k*) *Bern v. Mattaire*, Ca. Temp. Hardw. 119.

(*l*) *Pope v. Tillman*, 7 Taunt. 642; but see *Banks v. Angell*, 7 A. & E. 843.

(*m*) *Foot's case*, Salk. 93; Willcs, 475.

(*n*) Bro. Repl. 45; *Anon.*, Salk. 94.

(*o*) *Hollis v. Freer*, 2 B. N. C. 719.

(*p*) *Wildman v. Norton*, 1 Ventr. 249.

(*q*) *Presgrave v. Saunders*, 1 Salk. 5.

(*r*) *Butcher v. Porter*, Carth. 243.

(*s*) *Parker v. Mellor*, Ld. Raym. 217.

(*t*) 15 & 16 Vict. c. 76, ss. 66, 67.

plea to say, that the property is to the plaintiff and to a stranger; and where there are two plaintiffs, that the property is to one of them, for if the beasts of divers several men be taken, they cannot join in a *repleg.*, but every one must have a several replevin (*u*).

Statute of Limitations.—By 21 Jac. I. c. 16, s. 3, actions of replevin shall be commenced and sued within six years after the cause of action. Hence *actio non accrevit infra sex annos* is a good plea in bar in replevin.

VI. Of the Avowry and Cognizance.

The avowry or cognizance, which is in the nature of a declaration, ought to contain sufficient matter, upon which the avowant, or person making cognizance, may have judgment for a return. "In replevin, because the avowant is to have a return, he ought to make a good title *in omnibus*" (*x*). If the avowry, &c., be defective in form; or if circumstance of time, place, &c., should be omitted, such omission may be helped by the plea of the adverse party; otherwise it is of a defect in substance (*y*). The avowry, &c., must answer every material part of the declaration; hence, if the plaintiff alleges a taking in two places, and the defendant avows as to one only, it is a discontinuance (*z*). So if the declaration be for taking goods, chattels, and beasts, and the avowry is confined to the taking the beasts only, it will be bad on demurrer (*a*).

By 4 Ann. c. 16, s. 4, any defendant in any action, or any plaintiff in replevin, in any court of record, may, with leave of the court, plead as many several matters thereto as he shall think necessary for his defence. An avowant is a defendant within the meaning of this section, and may plead several avowries with leave of the court. By the Common Law Procedure Act, 1852, s. 81, this privilege is extended to subsequent pleadings. But by 2 Pl. R., H. T. 1853, several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, are not to be allowed, except such (by leave of the court or judge) as may be proper for determining the real question in controversy between the parties on its merits, subject to terms as to costs, &c. By rule 3—When no order has been made as to costs, and at the trial there is more than one plea, avowry, &c. founded on the same cause of action, or ground of answer or defence, and the judge or presiding officer shall, at the trial, certify to that effect on the record, the party so pleading shall be liable

(*u*) 1 Inst. 145, b.

(*x*) *Per Cur.*, *Goodman v. Aylin*, Yelv.

(*y*) *Butt's case*, 7 Rep. 25, a.

(*z*) *Weeks v. Speed*, Salk. 94.

(*a*) *Hunt v. Braines*, 4 Mod. 402.

for the costs occasioned by such plea, &c., and also those of the evidence.

Where D. and L. were defendants in replevin, the court allowed D. to avow for a distress damage feasant, in his own right as tenant from year to year to W., tenant in fee, and also to make cognizance as bailiff of C., tenant in fee; and L. to make cognizance as bailiff of D., tenant to W., as above; and also as bailiff of C., tenant in fee (b). In replevin for taking cattle, the defendant made cognizance as bailiff to J. S.; the plaintiff traversed the defendant being plaintiff to J. S.: it was held, that the traverse was well taken (c); for although J. S. had a right to take the cattle, yet a stranger, without his authority, could not; and that, as both parts of the cognizance must be true, an answer to either part was sufficient (d). In replevin for goods taken in closes A. and B., it was held, that the defendants might, under 3 & 4 Will. IV. c. 42, s. 21 (which is substantially re-enacted by the Common Law Procedure Act, 1852, s. 70), pay money into court as to the goods taken in A. and as to some of those taken in B., and avow and make cognizance as to the residue taken in B. (e).

VII. *Avowry for Damage feasant.*

The defendant may state in his avowry, that the *locus in quo* was his *soil and freehold*, (without specifying whether he had an estate in fee, fee-tail, or for life,) and that he took the plaintiff's cattle because they were doing damage there; and this is the usual form. From this plea it will be intended, that it is the avowant's sole freehold, and in his own right: consequently, if the avowant be seised merely in right of his wife, that fact should be stated (f). It would, however, since the Common Law Procedure Act, 1852, be unobjectionable, to plead that the avowant was *seised*, without showing of what estate (g); or that he was *possessed* of a messuage, with common appurtenant, and that the plaintiff's cattle were doing damage on the common (h). An avowry for damage feasant in a place where the avowant had a right of common, must allege special damage, *viz.* that the avowant could not enjoy his common in so ample and beneficial a manner (i). As tenants in common must join in actions concerning the personalty, one tenant in common cannot avow alone for taking cattle damage feasant; because it is

(b) *Evans v. Davies*, 8 A. & E. 362.

(c) This rule holds in trespass *qu. cl. fr.* as well as in replevin. *Chambers v. Donaldson*, 11 East, 65.

(d) *Trevillian v. Pyne*, Salk. 107.

(e) *Lambert v. Hepworth*, 2 Q. B. 729.

(f) *Bonner v. Walker*, Cro. Eliz. 524.

But, if omitted, it might be suggested

under sect. 143 of the Com. Law. Proc. Act, 1852.

(g) *Silly v. Dally*, 1 Lord Raym. 332; *Goggins v. Trench*, 10 Ir. C. L. R. 472.

(h) *Hawkins v. Eckles*, 2 B. & P. 359 15 & 16 Vict. c. 76, ss. 66, 67.

(i) *Woolton v. Salter*, 3 Lev. 104.

an injury to the possession, and an avowry of this kind is in the nature of a declaration in trespass for an injury done to the possession (*k*).

Pleas in Bar. Escape through Defect of Fences.—In a plea in bar of an avowry for taking cattle damage feasant, *viz.*, that the cattle escaped from a public highway into the *locus in quo*, through defect of fences, it must be shown, that they were *passing* on the highway when they escaped; it is not sufficient to state, that *being* in the highway they escaped; for that word is equivocal, and does not show whether the cattle were passing and repassing, or whether they were trespassing on the highway (*l*). “If the cattle of one person escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers in the close whence they came” (*m*). So in an action for digging a pit in a common, into which the plaintiff’s mare fell and was killed; it was held, that the declaration ought to have stated, that the mare was *lawfully* on the common, otherwise the digging the pit, as against the plaintiff, was justifiable, and although the plaintiff’s mare fell in, yet it was *damnum absque injuriâ* (*n*). “The general rule of law is, that a person is only bound to take care that his cattle do not wander from his own land and trespass upon the land of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes, of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person, who has so become the owner of the entirety, afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose” (*o*).

Right of Common.—To an avowry for damage feasant, a right of common may be pleaded in bar. In a prescription for a right of common during a certain portion of the year only, it must appear on the face of the plea, that the right was exercised during the time allowed (*p*). A copyholder claiming common in the soil of other persons than the lord, cannot prescribe *in his own name* on account of the weakness of his estate; he ought to prescribe in the name of the lord, *viz.* “that the lord of the manor and all his ancestors, and all those whose estate he has, had common in such place for himself and his tenants at will,” &c. (*q*) But where a copyholder

(*k*) *Cully v. Spearman*, 2 H. Bl. 386.

(*l*) *Dovaston v. Payne*, 2 H. Bl. 527.

(*m*) *Per Heath, J., S. C.*; *per Wilmot, C. J.*, in 3 Wils. 126, *acc.*

(*n*) *Blyth v. Topham*, Cro. Jac. 158.

(*o*) *Per Bayley, J.*, in *Boyle v. Tamlyn*, 6 B. & C. 337.

(*p*) *Jackson v. Bell*, Cro. Jac. 637.

(*q*) 4 Rep. 31, b.

claims common in the soil *of the lord*, then he cannot prescribe in the name of the lord; for the lord cannot prescribe to have common in his own soil, and as the copyholder cannot prescribe in his own name, he must allege, that "within the manor there is a custom from time immemorial, that all customary tenants of certain messuages have common in such a place," &c. (*r*). The lord of a manor may, in respect of common land in his own manor, have a right to turn his own sheep on the common of an adjoining manor (*s*). A custom that every inhabitant within any ancient messuage in an ancient vill, by reason of his commorancy therein, has had common in the place in question, is bad; for inhabitants, cannot have by custom a profit in another's soil, but they may claim certain customary easements, as a right of way to church, or a right to be quit of toll or of tithes (*t*). But although *inhabitants*, on account of the vagueness of the description, cannot claim a right *in alieno solo*, yet the occupiers of houses may set up a custom to cut turves, and occupiers of lands may by custom, claim a right *in alieno solo* (*x*). A custom for the freemen and citizens of a town on a particular day in the year to enter upon a close for the purpose of holding horse races is a good custom, and it is not necessary to aver that the particular day was a seasonable time (*y*); but a custom for the inhabitants of a parish to exercise and train horses at all seasonable times of the year in a place beyond the limits of the parish, is bad (*z*).

Tender of Amends.—Tender of amends *before* the distress makes the distress unlawful; *after* the distress, and before the impounding, makes the *detainer* unlawful (*a*); and this may be pleaded in bar to an avowry (*b*). In a case where the sheep damage feasant had been distrained by the avowant, and having been placed in an outhouse, about 200 yards from the place where they were taken, the plaintiff's son applied to the avowant's wife for the sheep, no one else being on the premises. The plaintiff's son had done business before with the avowant's wife on the subject of impounding the same sheep. Upon being asked what amends she required, she said 23s. if they did not impound the sheep, and 25s. if they took them to the public pound at Leominster. On the part of the avowant, it was contended, that the tender came too late, the sheep being already impounded; but the court ruled otherwise; observing, that the pound which will exclude a tender, must be a pound

(*r*) *Gateward's case*, 6 Rep. 60, b.

(*s*) *Earl of Sefton v. Court*, 5 B. & C. 917.

(*t*) *Smith v. Gatewood*, Cro. Jac. 152; *Lockwood v. Wood*, 6 Q. B. 65; *Baker v. Brereman*, Cro. Car. 418.

(*x*) Adm. *per Cur.*, in *Bean v. Bloom*, 2 W. Bl. 928.

(*y*) *Mounsey v. Ismay*, 1 H. & C. 729.

(*z*) *Sowerby v. Coleman*, L. R. 2, Ex. 97.

(*a*) 2 Inst. 107.

(*b*) *Evans v. Elliott*, 5 A. & E.

in which the cattle are no longer in the custody of the party, but in the custody of the law; here the agent of the distrainor (for the wife must be so considered) admitted that the sheep were destined for another pound, and consequently the tender was good (c).

VIII. *Avowry for Rent Arrear* (d).

At the common law, it was necessary for a termor, in an avowry for rent due from his tenant, to show out of what estate and in what manner the term was derived, because, particular estates being created by agreement of the parties out of the primitive estate, it was the office of the court to judge, whether the primitive estate and agreement were sufficient to produce the particular estate (e). To obviate the difficulties which the avowant for rent arrear had to encounter, in setting forth long and intricate titles; it was enacted by 11 Geo. II. c. 19, s. 22, that defendants in replevin might avow or make cognizance *generally*, that the plaintiff in replevin, or other tenant of the lands, whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then *and still* remains due; or that the place, where the distress was taken, was parcel of such certain tenements holden of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other *service* distrained for, was at the time of such distress and still remains due, without further setting forth the grant, tenure, demise, or title, &c.

It is not necessary, in an avowry for rent under this statute, to aver that the rent continued in arrear at the time of making the avowry (f). The above section does not extend to a rent-charge, services only being mentioned (g). In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially and leaving the apportionment of rent to be made by the jury, or he may avow generally under the above section; and in the latter case, if he avow for the entire rent, or for more or less than his proportion, the judge may amend the avowry, either by converting it into an avowry at common law, or by altering the amount avowed for in conformity with the proportionate value of the several parts into which the reversion has been divided (h). The sum stated in the

(c) See *Thomas v. Harris*, 1 M. & G. 695, as to what is sufficient impounding to oust a tender; *post*, p. 1262; *ante*, tit. "Distress," p. 602.

(d) By the 21 Hen. VIII. c. 19, s. 2, avowries may be made by the lord without naming the tenant; but this only

applies to lands held of the lord in fee. See *Banks v. Angell*, 7 A. & E. 843.

(e) *Scilly v. Dally*, Salk. 562.

(f) *Clarke v. Davies*, 7 Taunt. 72.

(g) *Bulpit v. Clarke*, 1 N. R. 56.

(h) *Roberts v. Snell*, 1 M. & G. 577.

avowry or cognizance to be due for rent is not material; for if it appears that less rent is due than defendant has avowed or made cognizance for, yet is he entitled to recover for so much as is due (k). The demise must be from the defendant, or some one from whom he claims. "The statute provides, that the defendant shall not be obliged to state in detail the landlord's title, but he is still required to show, that the party distrained upon held of the party making the distress (l).

Evidence that the plaintiff held under an agreement for a lease, (where rent has not been paid,) will not support an avowry or cognizance that the plaintiff held by virtue of a demise; for there is not any demise either expressed or implied (m). *Secus*, where rent has been paid (n). Tenant from year to year, during a current year, entered into an agreement for a lease to be granted to him and A. B.; and from that time A. B. entered and occupied jointly with him. It was held, that by this agreement, and the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted (o). Where the avowry is for parcel of a rent (p), or penalty (q) only, it ought to show that the residue has been satisfied or discharged, otherwise it will be bad on demurrer (r). If the defendant avow for so much rent arrear, part whereof is not due at the time of the distress, and enters judgment for the whole, it will be error; but it may be cured before judgment, by abating the avowry as to the part not as yet due (s). A rent is granted to A. for a term of years, with a clause in the deed, that A. and his heirs may distrain for the rent during the term; A. dies; the executor shall have the rent and distrain for it, and not the heir (t).

One joint-tenant may distrain for the whole rent; but he ought to avow for part only in his own right, and for the residue he ought to make cognizance as bailiff to his companion (u). Coparceners must join in an avowry for rent arrear (x). A. and B. were tenants in common in fee of land; A. granted a lease for years of his moiety to C., reserving a rent; C. assigned the lease to the co-tenant B.; it was held, that A. might distrain upon B., as he came in under the lessee, for rent arrear, and avow for taking the distress in any part of the land (y). But generally one tenant

(k) *Forty v. Imber*, 6 East, 437.

(l) *Per Williams, J., Banks v. Angell*, 7 A. & E. 843.

(m) *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Ald. 322.

(n) *Knight v. Bennett*, 3 Bingh. 361.

(o) *Hamerton v. Stead*, 3 B. & C. 478. See *Foquet v. Moor*, 7 Ex. 872.

(p) *Hunt v. Braines*, 4 Mod. 402.

(q) *Holt v. Sambach*, Cro. Car. 104.

(r) *Johnson v. Baynes*, 12 Mod. 84.

(s) *Richards v. Cornforth*, Salk. 580. See 1 Wms. Saund. 285, n. (6), (8).

(t) *Darrel v. Wilson*, Cro. Eliz. 645.

(u) *Pullen v. Palmer*, 5 Mod. 73; 12 Mod. 96.

(x) *Stedman v. Bates*, Lord Raym. 64.

(y) *Snelgar v. Henston*, Cro. Jac. 611.

in common cannot distrain upon another (z). An avowry, justifying the taking a distress for rent arrear for ready furnished lodgings, is good; it having been held, that a landlord is entitled to distrain for the rent of ready furnished lodgings (a).

The 5 & 6 Vict. c. 54, s. 18, enables defendants in replevin brought on any distress for rent-charge payable under the act for the Commutation of Tithes, (6 & 7 Will. IV. c. 71,) and the several acts to amend the same, to avow or make cognizance generally, that the lands and tenements whereon such distress was made were chargeable with or liable to the payment of a certain yearly amount of rent-charge, under the provisions of the statutes for the Commutation of Tithes; which rent-charge, or some part thereof, was in arrear and unpaid for the space of twenty-one days next after some half-yearly day of payment thereof, and after ten days' notice in writing as required by the said acts; and that a certain amount of rent-charge, according to the prices of corn, as directed by the said acts, was at the time of the said distress due to the person entitled to the rent-charge.

Pleas in Bar. Eviction.—To an avowry for rent arrear, the plaintiff may plead in bar an eviction or expulsion; for that occasions a suspension of the rent. But care must be taken, that an absolute eviction is stated in the plea, or at least such facts as amount in law to an eviction; for where to an avowry for rent arrear for a dwelling-house, the plaintiff pleaded that the defendant pulled down a summer-house, part of the premises, whereby the plaintiff was deprived of the use thereof; it was held, that the plea was insufficient, because it stated merely a trespass, and not an eviction (b); though if the plaintiff had pleaded an eviction the above facts would have been sufficient for the jury to have found a verdict in his favour; *per* Lord Mansfield, C. J., *S. C.* “The principle upon which eviction is a defence is this, that rent issues out of the land and is to be paid out of the profits, and if the land be taken away the rent is discharged” (c). And so if part only of the land, from which an entire rent is reserved, be taken away by the subsequent tortious act of the lessor, or if as to such part the demise be originally wholly void, the rent is suspended *in toto*. *S. C.* and in error; 1 M. & W. 747.

Non dimisit. Non tenuit.—The most usual pleas in bar to an avowry for rent arrear are; 1. *Non dimisit*, that is, that the avowant did not demise; 2. *Non tenuit modo et formâ*, or that the plaintiff did not hold the land as alleged. When issue is joined on the latter plea, the defendant is not held to strict proof as to the identical time during which he alleges the tenant to have held and

(z) *Kemp v. Cory*, 2 Vent. 228, 283.

(a) *Newman v. Anderton*, 2 N. R. 224. M. & R. 84.

(b) *Hunt v. Cope*, Cowp. 242.

(c) *Per Cur.*, *Neale v. Mackenzie*, 2 C.

enjoyed the land demised. Hence where the defendant made cognizance for rent in arrear for two years and a quarter, ending on the 25th December, 1803, proof that the plaintiff held and enjoyed from the 23rd of December, 1801, was adjudged sufficient to entitle the defendant to a verdict for two years' rent (*d*).

Where the plaintiff came into possession under one who had paid rent upon a distress by the defendant; it was held, that, after proof of that fact the plaintiff was estopped to dispute the defendant's title, no other person having claimed, or being shown to be entitled to, the rent (*e*). Proof of payment of rent to the avowant is *prima facie* evidence that he is owner of the land. But where the plaintiff did not originally *receive the possession of the land from the avowant*, it is competent to the plaintiff, although he has paid rent to the avowant, or otherwise acknowledged him as landlord, to rebut his supposed title, by showing that he (the tenant) paid rent under circumstances which did not entitle the avowant to the rent. And such evidence may be given on the issue of *non tenuit* (*f*). So where the defendant's title has determined, but the plaintiff has continued to pay him rent in ignorance of the fact (*g*). "In *Rogers v. Pitcher*, and *Gravenor v. Woodhouse*, (1 Bingh. 38) the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned, by mistake, to one who has no title. In the former case, the tenant cannot (except under very special circumstances) dispute the title; in the latter he may" (*h*). In *Hopcraft v. Keys*, 9 Bingh. 613, the defendant having only a defeasible title, demised to the plaintiff for years; before the first quarter's rent was due, the plaintiff was evicted by title paramount to defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had so evicted him: it was held, that a distress which had been taken by the defendant, could not be sustained; and that the eviction might in this case be given in evidence on the issue of *non tenuit*. And see *ante*, tit, "Ejectment," 1.

Declaration for taking plaintiff's corn in four closes, naming them. Avowry, that plaintiff held the closes in which, &c., under a certain rent, &c. Plea, *non tenuit*. The evidence was that the plaintiff held the four closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry; it was held that the proof supported the avowry; for each part of the land was liable to the whole rent; the tenant, therefore, held the portion of

(*d*) *Forty v. Imber*, 6 East, 434.

(*e*) *Cooper v. Blandy*, 1 B. N. C. 45, and no evidence being given to rebut the presumption, arising from the submission to a distress, that the person under whom the plaintiff claimed, claimed under the defendant.

(*f*) *Rogers v. Pitcher*, 6 Taunt. 202. Acc. *Gregory v. Doidge*, 3 Bingh. 474; *Claridge v. Mackenzie*, 4 M. & G. 143. But see *Hall v. Butler*, 10 A. & E. 204.

(*g*) *Fenner v. Duplock*, 2 Bingh. 10.

(*h*) *Per Bayley, J.*, in *Cornish v. Searell*, 8 B. & C. 475.

the land mentioned in the declaration at the whole rent, and a distress for the whole might have been taken on that or any part (i). But the contract on which the rent becomes due must be truly stated. Hence, where the avowry alleged that the plaintiff held at a yearly rent of 170*l.*, as tenant to A. : plea, *non tenuit* : it was held, that proof that the plaintiff held as tenant to A. of two-thirds only, at a rent of 170*l.* for the whole, was a variance ; for the owner of the one-third might still distrain for his third of the rent, and the judgment in the present case not being pleadable in bar, the record not disclosing the precise interest of the defendant, the tenant would be forced to pay one-third of the rent twice over (k). So where the defendant avowed on a contract for 100*l.*, and proved a demise of 15*s.* an acre, amounting to 111*l.* ; it was held a variance (l).

Cognizance by defendant as bailiff to R. W. for rent arrear on a demise from R. W. Plea, *non tenuit*. It appeared by the lease that R. W. was a receiver appointed by the Court of Chancery ; the reddendum was to R. W., or any future receiver. Verdict for defendant ; which the court refused to set aside, observing, that the plaintiff could not take a lease from R. W., and then turn round and say that he did not demise (m). Generally the receiver should avow in the name of the person who has the legal right to the rent (n). Under the plea of *non tenuit*, evidence that the defendant had assigned all his interest to the plaintiff, and had no reversion left in him, which negatives his right to distrain, is admissible (o).

Riens in Arrear.—Riens in arrear, or no rent in arrear, may be pleaded in bar to this avowry. This plea admits the holding to be as stated in the avowry. Hence, if the avowry state that the plaintiff held the premises under a rent reserved quarterly, the plaintiff will not be permitted to show, under this issue, that he held under a rent reserved half-yearly (p). Under this plea, payment to a ground landlord, or other incumbrancer by title paramount, may be given in evidence (q).

Tender of Arrears.—The same rule holds in this case as in the case of tender of amends for damage feasant (*ante*, p. 1156), for if the tenant, before distress, tender on the land the arrears of rent, the taking of the distress becomes wrongful ; and if the distress has been made, and before impounding the arrears are tendered, then the *detainer* is unlawful (r). Replevin for taking and detain-

(i) *Hargrave v. Shewin*, 6 B. & C. 34.

(k) *Philpott v. Dobbinson*, 6 Bingh.

104.

(l) *Brown v. Sayce*, 4 Taunt. 320.

(m) *Dancer v. Hastings*, 4 Bingh. 2 ;

Jolly v. Arbuthnot, 2 De G. & J. 224.

(n) *Pitt v. Snowden*, 3 Atk. 750. But see *Bennett v. Robins*, 5 C. & P. 379.

(o) *Parmenter v. Webber*, 8 Taunt. 593.

(p) *Hill v. Wright*, 2 Esp. 670.

(q) *Jones v. Morris*, 3 Ex. 742.

(r) 2 Inst. 1207.

ing, &c. Avowry for rent arrear; plea, that after the taking and before the impounding, plaintiff tendered the rent and expenses. It was argued (on demurrer) that there was not any instance of a replevin for a mere *detention*: but the court held the plea good; for the detention after the tender satisfied the allegation; every unlawful detention was a new taking (s).

It was formerly held that after the distress had been impounded, a tender of the rent and charges was too late; and that no action lay for selling the distress notwithstanding such tender (t). Now, however, an action is maintainable (u). In *Thomas v. Harries*, 1 M. & G. 695, the question arose, what was a sufficient impounding to oust a tender? Cattle being distrained, the distrainer left a note, stating their number, with the tenant, and on the following morning delivered to him a notice of distress, in which he stated that he had distrained upon the cattle, and had "impounded them in the place or places thereunder mentioned." The notice concluded thus: "An inventory of cattle, &c. distrained upon, and the same are impounded on the premises." It was held, that the impounding was complete, as against a tender subsequent to the notice; *Maule, J., dissentiente*, on the ground that the note left at the time of the distress was not itself an impounding, and that a notice that the cattle *had been* impounded (which was what the notice amounted to), could not make that an impounding, which was not so in itself; and that even if it were a sufficient impounding within the 11 Geo. II. c. 19, s. 10, still it was not sufficient to oust the tenant of his right of tender. Where the tenant assented to the manner of impounding, by thanking the distrainer the next day for the way in which the distress had been conducted, it was held that he could not afterwards object that no impounding had taken place (v). It is incumbent on a party pleading a tender to be accurate in his plea, and to prove a tender to the full amount stated. Hence, where defendant pleaded nothing in arrear beyond 16*l.*, and pleaded a tender of that sum; proof of a tender of 15*l.* 16*s.*, was held insufficient, although the latter sum only was proved to be due for rent (x).

Nil habuit in tenementis—cannot be pleaded in bar to an avowry for rent arrear by the tenant (for he cannot dispute his landlord's title) or by a stranger, either at common law, for that would be to call on the defendant to set out the title in his replication he had set out before in his avowry, or under the 11 Geo. II. c. 19, s. 11, for that would be to overthrow the statute, which was passed in ease of landlords, and to prevent their title from being

(s) *Evans v. Elliott*, 5 A. & E. 142.

(t) *Ladd v. Thomas*, 12 A. & E. 117; *Ellis v. Taylor*, 8 M. & W. 415.

(u) *Johnson v. Upham*, 28 L. J., Ex. 25. See *ante*, p. 609.

(v) Per *Erle, J.*, *Tennant v. Field*, 27

L. J., Q. B. 33. See *ante*, p. 1256.

(x) *John v. Jenkins*, 1 Cr. & M. 227. Acc. as to tender of amends in trespass, *Williams v. Price*, 3 B. & Ad. 695; and see *Marks v. Lahee*, 3 B. N. C. 408.

disputed in this action. Nor any plea which amounts to *nil habuit* (y). Nor can evidence be given under another form of plea, but substantially raising that defence (z). But the tenant may plead payment of an annuity secured out of the demised lands previously to the demise to him, for the arrears of which the grantee had threatened to distrain (a). So to an avowry for rent the tenant may plead payment of it to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff, and threatened "to put the law in force" in case of refusal; for such a plea is not a plea of *nil habuit in tenementis*, nor of eviction (b), but of *riens in arriere* (c).

Payment into Court.—By C. L. P. Act, 1860, s. 23, the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs as in other actions. By s. 24, such payment into court shall not, nor shall the acceptance thereof by defendant in satisfaction, work a forfeiture of the replevin bond.

Set-off.—There cannot be a set-off in replevin (d). To an avowry for rent arrear, the tenant pleaded that a certain sum (equal in amount to the rent arrear) was due for ground-rent from the avowant to the original landlord; that payment of that sum was demanded of the avowant, who refused to pay the same, whereupon the original landlord demanded payment of the tenant, and threatened to distrain, and that tenant, in order to avoid a distress, paid the ground-rent: on demurrer, the plea was held to be good; *Buller, J.*, observing, that there was a difference between a payment and a set-off, the former might be pleaded to an avowry (see *supra*), though the latter could not (e).

IX. Of the Verdict and Judgment.

For the Plaintiff.—As, by the nature of the proceedings in replevin, the goods distrained are delivered by the Registrar of the county court to the plaintiff; if he recovers, he can have judgment for damages only. If the plaintiff has judgment on a demurrer, the form of entry is "that the plaintiff do recover his damages, by reason of the premises" (f); whereupon a writ of inquiry is awarded to ascertain the damages, and on return of the inquisition, final judgment is entered for the damages found by the inquisition, and costs *de incremento*. If the plaintiff obtains a

(y) *Sullivan v. Stradling*, 2 Wils. 208;
Alchorne v. Gomme, 2 Bingh. 54.

(z) *Parry v. House*, Holt's N. P. C. 489.

(a) *Taylor v. Zamira*, 6 Taunt. 524.

(b) *Johnson v. Jones*, 9 A. & E. 809.

(c) *Jones v. Morris*, 3 Ex. 742.

(d) *Absalom v. Knight*, Barnes, 450, 4to edit.; Bull. N. P. 181.

(e) *Sapsford v. Fletcher*, 4 T. R. 511.

(f) 2nd Book of Judgm. 20; Chitt. Forms, 592 (7th edit.).

verdict, then the jury, on that verdict, ascertain the damages and costs; and the judgment is, "that the plaintiff do recover against the defendant the damages assessed by the jurors, and costs *de incremento*" (g).

For the Defendant.—In the case of a distress for rent arrear, the 17 Car. II. c. 7, has prescribed the mode of proceeding in the four following cases:—

1. If the plaintiff shall be nonsuit, *before issue joined*, in any suit of replevin by plaint or writ lawfully removed, the defendant may make a suggestion in nature of an avowry or cognizance for the rent arrear, whereupon the court, upon prayer of the defendant, will award a writ of inquiry touching the sum in arrear at the time of the distress, and the value of the distress. On the return of the inquisition, the defendant will have judgment to recover the rent arrear, if the distress amounts to the value of it; if not, then to recover the value of the distress (h) with full costs (i). Sect. 2.

2. If the plaintiff shall be nonsuit, after cognizance or avowry made, and issue joined, the jurors that are impannelled to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears and the value of the distress, and thereupon the defendant is entitled to the same judgment as in case 1. Sect. 2. But the defendant, by not adopting this course, does not waive his right to sue the sureties on the replevin bond, or to sue out the writ *de retorno habendo* at common law (k).

3. If, after cognizance or avowry made, and issue joined, the verdict shall be given against the plaintiff, the jurors that are impannelled to inquire of such issue shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the distress, and thereupon the defendant is entitled to the same judgment as in case 1. Sect. 2.

It must be observed, that if the jurors give a defective verdict, *e.g.* if they find the value of the distress, but omit to find the sum of the arrears, this omission cannot be supplied by a writ of in-

(g) *Ibid.*

(h) Where the value of the cattle distrained shall not be found to be to the value of the arrears, the party to whom such arrears are due, his executors, or administrators, may, from time to time, distrain again for the residue. Sect. 4.

(i) For the form of prayer, writ of inquiry, judgment, &c. see Lilly's Entries (3rd edit.), 610; Chitt. Forms (7th edit.), 587, *et seq.* If the plaintiff be non-prossed, after the defendant has avowed, for want of a plea in bar, it seems unnecessary to add a suggestion, the cause of the distress being sufficiently ascertained by the avowry. See form of writ

of inquiry in this case, Chitt. Forms (7th edit.), 598.

(k) *Hefford v. Alger*, 1 Taunt. 218. In case of the plaintiff in replevin being nonsuit, the judgment at common law is for a return, but not for a return *irreplevisable*. *Cooper v. Sherbrooke*, 2 Wils. 116. The plaintiff might therefore replevy the goods taken again and again. This was remedied by the 13 Edw. I. c. 2, which provided for the issuing by the plaintiff in such a case of a writ called a writ of second deliverance, which proceeding, however, since the above statute, is practically obsolete, if not abolished. See *Playters v. Sheering*, 1 Ventr. 64.

quiry : because the statute directs that the jurors, who are impannelled to try the issue, shall inquire concerning the sum of the arrears (*l*). The case of *Sheape v. Culpeper* was recognized by Lord Hardwicke, C. J., in *R. v. Kynaston*, B. R., T. 10 Geo. II., MS. ; where it was held, that the court could not supply a defective verdict, where several traverses had been taken on a return to a mandamus, under the 9 Ann. c. 20, and the jury had omitted to find damages and costs for the plaintiff. Ca. Temp. Hardw. 297, *S. C.* This point was again moved in *Freeman v. Lady Archer*, 2 W. Bl. 763 ; and Gould, J., then expressed a doubt, whether a writ of inquiry could be granted to supply a defective verdict for the defendant in the case of an avowry for rent arrear. It appears clearly, from the case of *Sheape v. Culpeper*, that it cannot. And in a subsequent case, where the jury found a verdict for the avowant, and damages to the amount of the rent claimed in the avowry, but did not find either the amount of the rent in arrear, or the value of the distress, and judgment was entered for the damages assessed ; it was held, that this judgment was erroneous, and could not be amended into a judgment under the statute, *because the neglect of such inquiry by the jury could not be in any manner supplied* (*m*).

But in cases where the court is not restrained by the express words of the statute (which relates to rent arrear only), an inquiry may be granted to supply omissions on the part of the jury at the trial of the replevin (*n*). Hence, where the defendant avowed, as overseer of the poor, for a distress for a rate under 43 Eliz. c. 2, and at the trial the plaintiff was nonsuit, and the jury was discharged without any inquiry of the treble damages given by the 19th section of that statute to defendants in case of a nonsuit after appearance ; an application was made to the court that the avowants might have a writ of inquiry awarded to supply this defect ; which application, after much debate, was granted (*o*). A similar application was made in the case of *Valentine v. Fawcett*, 2 Str. 1021 ; Ca. Temp. Hardw. 138, where a *verdict* had been given for the defendant, who had justified under the same statute, 43 Eliz. c. 2 ; Lord Hardwicke, C. J., (with whom the rest of the court concurred,) was of opinion, that a writ of inquiry ought to be granted, upon the ground, that the words of this section of the statute were sufficient to take in this case, *viz.*, "that defendant shall recover treble damages, to be assessed by the same jury, or writ to inquire of the damages, as the same shall require." So in the case of an avowry for distress damage feasant (*p*).

(*l*) *Sheape v. Culpeper*, 1 Lev. 255.

(*m*) *Rees v. Morgan*, 3 T. R. 349. But the court in this case permitted the defendant to amend his judgment by entering a common law judgment.

(*n*) *Dewell v. Marshall*, 2 W. Bl. 921 ; *per Gould, J.*, 3 Wils. 442.

(*o*) *Herbert v. Walters*, Ld. Raym. 59 ; Carth. 362.

(*p*) *Humphreys v. Misdale*, Comb. 11.

4. If judgment be given upon demurrer for the avowant or person making cognizance, the court, at the prayer of the defendant, will award a writ to inquire of the value of the distress (*q*); and upon return thereof, the like judgment shall be given as in case 1, that is to say, to recover the rent alleged to be in arrear in the avowry or cognizance, if the distress shall amount to the value of it; if not, then to recover the value of the distress, with full costs (*r*). Sect. 3.

It is worthy of remark, that this statute, which defines with so much accuracy the mode of proceeding to be adopted by a defendant who succeeds in a replevin suit, has not superseded the judgment at common law, which may still be entered, if the defendant shall be so advised; for the statute is considered as giving a further remedy, and not as extinguishing the remedy to which the defendant was held entitled at common law. Under this view of the statute, it has been held, that an avowant may enter a common law judgment, and also pray a writ of inquiry under the statute (*s*). The statute is strictly confined to *rents*. And, therefore, where the defendant avowed for taking a distress for a *penalty* for selling hay off the premises, and obtained a verdict, and signed judgment under the statute, the judgment was reversed in error (*t*); although, if he had avowed for additional or penal rent, it would have been otherwise. *S. C.*

X. Of the Costs and Damages.

1. *As to the Plaintiff*.—At the common law the plaintiff obtaining judgment in replevin was not entitled to costs (*u*); but by the stat. of Gloucester, 6 Edw. I. c. 1, s. 2, the plaintiff is entitled to costs in all cases where he was entitled to *damages* antecedently to that statute; of course, therefore, the plaintiff is entitled to costs in replevin.

2. *As to the Defendant*.—At the common law, if an avowry, or cognizance, or justification, was found for the defendant in replevin, or if the plaintiff was otherwise barred, the defendant was not entitled to costs. By 7 Hen. VIII. c. 4, s. 3, persons making avowry, cognizance, &c. for any *rent, custom, or service*, if their avowry, &c. be found for them, or if the plaintiff be otherwise barred, shall recover their damages or costs, as the plaintiff should have done if he had recovered. By 21 Hen. VIII. c. 19, damages and costs

(*q*) The amount of the rent alleged to be due in the avowry or cognizance being admitted by the demurrer, it is not necessary in this case, as it is in the three preceding cases, that the inquiry should extend to the amount of the rent in arrear. See form of writ of inquiry, Chitt. Forms

(7th edit.) 601.

(*r*) See form of judgment, prayer of writ of inquiry, award thereof, &c. *Moumson v. Redshaw*, 1 Saund. 195.

(*s*) *Baker v. Lade*, Carth. 254.

(*t*) *Pollitt v. Forrest*, 11 Q. B. 949.

(*u*) 2 Inst. 288.

are given to the defendants in replevin, not only in the cases provided for by the preceding statute, but also in the cases of avowries, &c. for damage feasant, "or for other rent or rents," if such avowries, &c. be found for them, or if the plaintiff be otherwise barred. And by the 4 Jac. I. c. 3, s. 2, a defendant in any action whatsoever, obtaining judgment upon verdict or nonsuit is entitled to recover costs in every species of action wherein the plaintiff, if he had prevailed, might have recovered them. See Gray on Costs, p. 209.

A replevin was held not to be within the meaning of the 8 & 9 Will. III. c. 11, s. 1, which gave costs to one or more of several persons improperly made defendants in actions of trespass, assault, false imprisonment, or *ejectio firmæ* (x). But this was remedied by the 3 & 4 Will. IV. c. 42, s. 32, which applies to all personal actions.

By 11 Geo. II. 19, s. 22, defendants in actions of replevin for distresses for rent, &c., and other *services*, if the plaintiff became nonsuit or discontinued his action, or had judgment given against him, were entitled to double costs; and are now, therefore, entitled to "the full and reasonable indemnity as to all costs, charges, and expenses incurred, &c.," mentioned in the 5 & 6 Vict. c. 97, s. 2. But this does not apply to owners of a tithe rent-charge, distraining therefor, under the 81st sect. of the 6 & 7 Will. IV. c. 71 (y).

(x) *Ingle v. Wordsworth*, 3 Burr. 1285. (y) *Newnham v. Bever*, 8 C. B. 560.

CHAPTER XXXIV.

RESCOUS.

THE term rescous, as far as it relates to the subject of this chapter (a), means the setting at liberty, against law, a person arrested by process or course of law (b). To recover a compensation for this injury, the plaintiff may bring an action of rescous, or an action on the case, against the party guilty of the rescous. The action of rescous having fallen into disuse, the usual mode of proceeding is by an action on the case; to support which it is necessary for the plaintiff to prove, if put in issue by the pleadings (c),—

1. The original cause of action.

2. The writ and warrant, by the production of copies of them, sworn to be true copies by a witness who has compared and examined them with the originals.

3. The manner of the arrest, in order that it may appear to the court whether the arrest was legal or not; for without a legal arrest there cannot be a rescue.

Mere words only, as if the officer says to the defendant, "that he has a warrant against him, and that he arrests him," will not constitute an arrest (d), if the defendant afterwards escapes from the officer; but if the defendant acquiesces, and goes along with the officer, this will be considered as submitting himself to the process, and as complete an arrest as if the officer had touched the person of the defendant (e). It is a good arrest if a sheriff's officer, having in his possession a writ of *ca. sa.*, goes to the house in which the execution debtor is, and thrusting his hand through the window where a pane of glass had fallen out, touches the execution debtor, saying, "you are my prisoner." A touch is sufficient, although the power is wanting to put the debtor under corporeal restraint (f).

(a) For rescous of distress, see *ante*, tit. "Distress," sect. VIII. By 5 & 6 Vict. c. 98, s. 31, "if any debtor in execution shall escape out of legal custody, the sheriff, bailiff or other person having the custody of the debtor shall be liable only to an action on the case for damages sustained by the person or persons at whose suit the debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape."

(b) 1 Inst. 160, b.

(c) The plea of not guilty "will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment or preliminary proceedings." Plead. Rules, Hil. T. 1853, r. 16.

(d) *Genner v. Sparks*, Salk. 79.

(e) *Horner v. Battlyn*, B. R., H. 12 Geo. II., Bull. N. P. 62.

(f) *Sandon v. Jervis*, 27 L. J., Q. B. 279; affirmed by Exch. Chamb. (*on error*), Feb. 4, 1859.

An officer having two warrants *in his pocket* against the defendant (g), at the several suits of A. and B., laid his hands on the defendant, and said to him, "I arrest you by virtue of a warrant that I have;" but he did not show the defendant the warrant, *nor had it in his hand*, nor told the defendant at whose suit he arrested him, neither did the defendant demand to see the warrant, or to be informed at whose suit he was arrested. It was held; 1st, That this arrest without showing the warrant, and without mentioning at whose suit the defendant was arrested, was legal, and that it was not incumbent on the officer to show the warrant to the defendant until he obeyed and demanded it. 2ndly, that this arrest was legal, although the officer had not the warrant in his hand, and although he had two warrants in his pocket for the defendant; for, being under the bailiff's arrest, he was in custody for all causes for which the sheriff had made his warrant against him, although the sheriff or bailiff did not mention any specially.

By 29 Car. II. c. 7, s. 6, "No person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of felony or breach of the peace), but the service of every such writ, &c. shall be void to all intents and purposes." As it is matter of public policy that proceedings of the nature described in the statute should not be executed on a Sunday, the regularity or irregularity of them cannot depend on the assent of the party afterwards to waive an objection to such proceedings, because they are in themselves absolutely void by the statute (h). In the construction of this statute, it has been held, that an arrest cannot be made on a Sunday for non-payment of a penalty by a defendant who has been convicted on a penal statute (i). The statute prohibits original arrests only on Sundays. Hence, a defendant, who wrongfully escapes from the custody of the law, may be retaken upon a Sunday on fresh pursuit (k), or by virtue of an escape warrant, which is in the nature of fresh pursuit, for it is not original process, and a commitment upon it is only the old commitment continued down (l). But after a voluntary escape, defendant cannot be retaken on a Sunday (m). So where A. was arrested at the suit of B., and discharged, the sheriff not knowing that there was also a detainer in his office against A. at the suit of C., and on the Sunday following the sheriff arrested A. at the suit of C., the court discharged him out of custody, considering the arrest on the Sunday, either as an original taking, which was prohibited by the statute, or as a retaking after a voluntary escape which was bad under the authority of the preceding case (n), where the distinction between a voluntary and a negligent escape was recognized. A

(g) *Hodges v. Marks*, Cro. Jac. 485.

(h) *Taylor v. Phillips*, 3 East, 155.

(i) *R. v. Myers*, 1 T. R. 265.

(k) Admitted in *Parker v. Moor*, Salk. 626.

(l) Adjudged in *Parker v. Moor*, Lord Raym. 1028; Salk. 626; 6 Mod. 95.

(m) *Featherstonehaugh v. Atkinson*, Barnes, 373.

(n) *Atkinson v. Jameson*, 5 T. R. 25.

person may be arrested on a Sunday on an attachment for a rescue (o). But a rule nisi for an attachment for non-payment of a sum of money, pursuant to the master's allocatur, cannot be served on a Sunday (p). If a defendant, after an arrest on mesne process, was rescued on his way to gaol, the only remedy which the plaintiff had, was by an action against the rescuers, since the sheriff was excusable, by reason of the rescue; for on mesne process the sheriff was not bound to take the *posse comitatus* with him, and, therefore upon such process it was a good return to return the rescous (q). In an action against the sheriff for an escape on mesne process, if he pleaded a rescue, it was not incumbent on him to show that the rescue was returned (r). If the party is once within the walls of the prison, (s), though the custody is on mesne process only, yet a rescue thence by any persons (excepting the king's enemies (t), will not excuse the sheriff. So on writs of execution the sheriff cannot return a rescue; for the law supposes that the sheriff is attended with his *posse comitatus* (u). So if the defendant is brought out of prison after judgment, and before any charge in execution on a habeas corpus, and is rescued on his way to the judge's chambers, the sheriff will be answerable in an action for an escape; for it is his duty, and so he is directed by the writ, to provide for the sure and safe conduct of the party (x). Where a sheriff, in obedience to a warrant from a commissioner of bankruptcy, brings a party whom he has in custody in execution for debt beyond the limits of his county in order to be examined by the commissioner, he is bound to take such prisoner back again within a convenient time after the examination is over; but during the time the prisoner is so necessarily beyond the limits of the sheriff's county, it is sufficient if he is accompanied and duly watched by the officer, and it is no escape by the sheriff that the prisoner is, during that time, allowed to go about with the sheriff's bailiff to several places and to dine and sleep at an inn (y).

4. The plaintiff must prove the *damage* sustained by the rescue. The true measure of damages against the sheriff, under the 5 & 6 Vict. c. 98, s. 31, is the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after the escape. If, however, the plaintiff has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor, the damages will be materially affected by such conduct (z).

(o) Willes, 459.

(p) *M'Ilham v. Smith*, 8 T. R. 86.

(q) *May v. Proby*, Cro. Jac. 419.

(r) *Gorges v. Gore*, 3 Lev. 46. See 1 & 2 Vict. c. 110, for abolishing arrest on mesne process in civil actions except in certain cases.

(s) *May v. Proby*, 1 Roll. Rep. 441. Resolved, *per tot. Cur.*, recognized in 1

Str. 435.

(t) *Per Coke*, in his report of *Southcote's case*, 4 Co. 84, a.

(u) *May v. Proby*, 1 Roll. Rep. 441. Resolved *per tot. Cur.*

(x) *Crompton v. Ward*, Str. 429.

(y) *Niass v. Davis*, 4 C. B. 444.

(z) *Arden v. Goodacre*, 11 C. B. 371; 20 L. J., C. P. 184.

By a contract of sale, the property sold was to be paid for in ready money. The vendee induced the servant of the vendor to deliver it for a check upon a banker, by representing it to be as good as ready money; in fact, he had overdrawn his account for many months. The vendor, after keeping the check for two days, presented it at the bankers, when payment was refused. On the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor, under which judgment was immediately entered up and execution issued, and the property in question seized by the bailiff of a liberty; while it was in his custody, the vendor rescued it; it was held, in an action brought against the latter by the bailiff of the liberty, for the rescue, that the question whether the contract of sale was so vitiated by fraud, as to prevent the property in the goods passing to the vendee, depended upon a question of fact which ought to have been submitted to the jury; *viz.*, whether the vendee had obtained possession of the goods with a preconceived design not to pay for them; for if he had, that would be such a fraud as would vitiate the sale, and prevent the property from passing to him (a).

Where a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds: it was held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money (b).

(a) *Earl of Bristol v. Wilsmore*, 1 B. & C. 514.

(b) *Taylor v. Plumer*, 3 M. & S. 562.
See *Gladstone v. Hadwen*, 1 M. & S. 517.

CHAPTER XXXV.

SHIPPING.

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I. *Of the Merchant Shipping Act, 1854, Part II. As to British Ships: their Ownership and Registry.*

THE Ship Registry Act (a) having been repealed (b), and the laws relating to the subject of this section having been consolidated by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), amended by the Merchant Shipping Act Amendment Acts, 1855 & 1862 (18 & 19 Vict. c. 91, & 25 & 26 Vict. c. 63), it will be unnecessary to consider the enactments in force previous to the passing of the Act of 1854. The second part of the Act contains the provisions with which this section is concerned, and these may, so far as they fall within the limits of this work, be arranged under the following heads, suggested by the learned author of the Treatise on Shipping :—

- I. *What are the Privileges acquired by Registry*, p. 1173.
- II. *What Ships must be or are entitled to become and continue Registered Ships*, p. 1173.
- III. *Who may be owners*, p. 1173.
- IV. *At what Place Ships may be Registered*, p. 1174.
- V. *Of the Certificate of Registry*, p. 1175.
- VI. *What is required on the part of the Owners to obtain Registry*, p. 1175.
- VII. *Of Transfers and Transmissions*, p. 1176.
- VIII. *Mortgages*, p. 1177.
- IX. *Certificates of Mortgage and Sale*, p. 1178.
- X. *Registry anew and Transfer of Registry*, p. 1179.
- XI. *What shall be sufficient Evidence of Declarations, Certificates, and Books of Registry*, p. 1180.

(a) 8 & 9 Vict. c. 89.

(b) 17 & 18 Vict. c. 120.

I. *What are the Privileges acquired by Registry.*

The exclusive privileges which it was so long the policy of this country to secure to British ships, by means of the enactments known as "The Navigation Laws," having been swept away so far as the foreign trade is concerned by 12 & 13 Vict. c. 29, and as to the coasting trade by 17 & 18 Vict. c. 5, the only privileges to which a British ship is now entitled, are those of carrying the national flag, and of claiming the national protection.

II. *What Ships must be or are entitled to become and continue Registered.*

Every "British ship" *must* be registered, except certain coasters not exceeding fifteen tons' burden, and certain fishing vessels not exceeding thirty tons, employed on the coast of Newfoundland and the vicinity. And no ship required to be registered will, unless registered, be recognized as a British ship, or be cleared out or allowed to proceed to sea (*c*). British ships are such as are owned in the manner mentioned in the next section, but it is not necessary that they should be British built, or that the crew should be wholly or in part British seamen, as was formerly the case (*d*).

The registry of the ship specifies the names of all registered owners, and the proportions in which they are interested (*e*); and on transfer of the ship, or any share therein, the new owner must be registered as transferree (*f*). The consequence of omitting to register a transfer will be, that the transferror will continue competent to dispose absolutely of the interest transferred (*g*).

The commissioners of customs, or the governor of any British possession, are empowered, under special circumstances, to grant a pass within her Majesty's dominions to a British ship without being registered (*h*).

If any registered ship is either actually or constructively lost, taken by the enemy, burnt, or broken up; or by reason of a transfer to any persons not qualified to be owners of British ships, or otherwise ceases to be a British ship, notice must be given to the registrar, and her certificate of registry must be delivered up (*i*). And, as will be more fully explained in a subsequent page (*k*), if a ship is so altered, as not to correspond with the register, she must be registered anew (*l*).

III. *Who may be Owners.*

The owners must be either:—1. Natural-born British subjects; provided that any such subject, who has taken the oath of

(*c*) 17 & 18 Vict. c. 104, sect. 19. See *Benyon v. Cresswell*, 12 Q. B. 899.

(*d*) See 8 & 9 Vict. c. 89, ss. 18, 19, and 12 & 13 Vict. c. 29, s. 7.

(*e*) Sect. 42.

(*f*) Sect. 57.

(*g*) Sect. 43. *Bell v. The Bank of London*, 3 H. & N. 730.

(*h*) Sect. 98.

(*i*) Sect. 53.

(*k*) *Post*, p. 1179.

(*l*) Sect. 84.

allegiance to a foreign state, must subsequently take the oath of allegiance to her Majesty, and reside, or be partner in a house carrying on business within her dominions, or be a member of a British factory. 2. Persons made denizens or naturalized, subject to a similar proviso. 3. Bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom, or some British possession (*m*).

The property in a ship must be divided into sixty-four shares; but not more than thirty-two individuals can be registered owners of one ship, except in cases of joint ownership, or ownership by transmission, on death, bankruptcy, insolvency, or marriage (*n*). No person can be registered as owner of a fractional part of a share; but any number, not exceeding five, may be registered as joint owners of a ship, or of a share or shares therein. Joint owners will constitute one person only as regards the above rule relating to the number of owners, but are not entitled to dispose of their shares in severalty (*o*).

No notice of any trust, express, implied or constructive, can be registered; but the registered owner may dispose absolutely of the ship or share in respect whereof he is registered, subject to the matters appearing on the register book (*p*). The rule relating to the number of owners, however, will not affect the *beneficial* title of any number of persons or of any company represented by, or claiming under, any registered owner or joint owner (*q*).

If the property in any ship or share devolves on any person not qualified to own British ships, on death, or on the marriage of a female owner, the Court of Chancery, or other appropriate court, may order a sale of the interest so transmitted (*r*).

IV. *At what Place Ships may be Registered.*

The registry may be made at any port or place in the United Kingdom or Isle of Man, approved by the commissioners of customs for the registry of ships, or within her Majesty's dominions abroad, as mentioned in the 30th section of the act. And the port or place at which any British ship is registered for the time being will be considered her port of registry, or that to which she belongs (*s*). The registry may be transferred from port to port, but without prejudice to the rights of parties interested (*t*).

(*m*) Sect. 18. See *R. v. Arnaud*, 9 Q. B. 806.

(*n*) See sects. 58 to 64. Any number of owners on whom a ship or share may devolve by such transmission may, if qualified, be registered, and will count as one person only within this rule. Sect. 60, *post*, p. 1176.

(*o*) Sect. 37. As to the interests of part owners in the ship and its earnings, &c., see *Green v. Briggs*, 6 Hare, 395;

Alexander v. Simms, 18 Beav. 80; 23 L. J., Chan. 721; *Darby v. Baines*, 9 Hare, 369.

(*p*) See sect. 43. See 25 & 26 Vict. c. 63, s. 3, which enacts that equities are not excluded by the act of 1854.

(*q*) Sect. 37.

(*r*) Sects. 62, 63, *post*, p. 1176.

(*s*) Sect. 33.

(*t*) Sects. 89, 90, 91.

V. *Of the Certificate of Registry.*

On completion of registry, the registrar grants the certificate of registry, comprising the following particulars :—1. The ship's name and port ; 2, her description ; 3, the master's name ; 4, the particulars of her origin ; and 5, the names of the owners and the proportions in which they are interested, indorsed upon the certificate (*u*). And any change of ownership, or of the master, must be indorsed by the proper officer (*x*). If the ship's certificate be lost, mislaid, destroyed, or detained (*y*), a fresh certificate will be granted (*z*). If a ship is acquired by British owners at a foreign port, a provisional certificate may be granted, available for six months, or till the ship's arrival at a port where there is a British registrar (*a*). And a pass granted under special circumstances by the commissioners of customs, or the governor of a British possession, to an unregistered ship to proceed within her Majesty's dominions, will have the same effect as a certificate (*b*).

The certificate should be in the custody of the master (*c*), and may only be used for the purposes of the navigation of the ship, and is not subject to detention on account of any lien, charge, or interest claimed in respect of the ship (*d*). This makes any pledge of the certificate for any purpose whatever, though for a good consideration, illegal and void, and consequently any detainer of a certificate so pledged illegal (*e*). And if the ship is actually or constructively lost, taken, burnt, broken up, or ceases to be British, the certificate is to be delivered up (*f*).

VI. *What is required on the part of the Owners to obtain Registry.*

The application for registry must be made by one or more of the owners, or their agent, appointed by writing ; except in the case of a corporation, whose application must be by agent appointed under the common seal (*g*). Before registry, the ship's name and port must be painted on her stern (*h*) ; and she must be surveyed by an official surveyor, and the particulars as to her description certified by him (*i*). No person can be registered as owner of the ship, or any share therein, until he has made a declaration of ownership, containing the particulars, and in the form required by the act (*j*). A certificate from the builder, together with the bill of sale, if any,

(*u*) Sect. 44.

(*x*) Sects. 45, 46.

(*y*) Sect. 51.

(*z*) Sects. 48, 49.

(*a*) Sect. 54.

(*b*) Sect. 98.

(*c*) *Arkle v. Henzell*, 27 L. J., M. C. 110.

(*d*) Sect. 50. See *Bowen v. Fox*, 10 B. & C. 41 ; *Cazenove v. Clayton*, 2 Moo. & R. 553 ; *R. v. Walsh*, 1 A. & E. 481.

The master has no lien on the certificate. *Gibson v. Ingo*, 6 Hare, 162.

(*e*) *Wiley v. Crawford*, 1 B. & S. 265, in error ; 30 L. J., Q. B. 319.

(*f*) Sect. 53.

(*g*) Sect. 35.

(*h*) Sect. 34. Pleasure yachts may be exempted, 18 & 19 Vict. c. 91, s. 13.

(*i*) Sect. 36.

(*j*) Sects. 38, 39.

by virtue of which the ship or share has become vested in the party requiring to be registered, must be produced ; but in case of foreign-built ships the builder's certificate may, under some circumstances, be dispensed with. If the ship has been condemned, an official copy of the condemnation must also be produced (*k*). In case of incapacity, the declaration may be made by the guardian, committee, or other proper substitute (*l*) ; and the act gives the registrar power, with the sanction of the commissioners of customs, if reasonable cause exists, to dispense with the declarations and evidence required by the act, subject to certain conditions (*m*).

VII. *Of Transfers and Transmissions.*

A registered ship or any share therein, when disposed of to qualified British owners, must be transferred by bill of sale, in the form contained in the act, to be executed by the transferror, in the presence of and attested by one or more witnesses (*n*). A vessel which has been registered, but has been converted into a coal hulk, is not a ship so as only to be transferable by bill of sale (*o*). No transferee may be registered until the declaration required by the act has been duly made (*p*). The transfer is to be registered at the ship's port of registry, and the fact of registry, with the date and hour thereof, will be indorsed on the bill of sale by the registrar. And all the bills of sale will be registered in the order of their production to the registrar (*q*). If the property in the ship or share becomes transmitted in consequence of the death, bankruptcy, or insolvency of a registered owner, or of the marriage of a female owner, a declaration according to the form prescribed in the act must be made (*r*), and appropriate evidence given (*s*), whereupon the person or persons entitled will be registered as owners of the transmitted share (*t*). In case, on the marriage of a female owner, or death, the ship or share becomes vested in any person not qualified to own British ships, the Court of Chancery, or other appropriate court, may order a sale of the interest of the unqualified person (*u*), provided the application is made within four weeks of the event causing the transmission, or such further time not exceeding a year from such event, as the court may allow, and if the application is not so made, the ship or share will be forfeited (*v*). And the act gives power to the Court of Chancery, or other appro-

(*k*) Sect. 40.

(*l*) Sect. 99.

(*m*) Sect. 97.

(*n*) Sect. 55. It would appear that a vessel unnecessarily registered may be transferred without a bill of sale. *Benyon v. Cresswell*, 12 Q. B. 899. See *Duncan v. Tindall*, 13 C. B. 258, decided on the repealed statute.

(*o*) *European and Australian Royal Mail Company v. The Peninsular and Oriental Steam Navigation Company*, 14

L. T. (N. S.) 704.

(*p*) Sect. 56.

(*q*) Sect. 57.

(*r*) Sect. 58.

(*s*) Sect. 59.

(*t*) Sect. 60. These persons, however numerous, will be considered as one person only in reckoning the thirty-two persons entitled to be registered. *Ibid*.

(*u*) Sects. 62, 63.

(*v*) Sect. 64.

prate court, to make an order to prohibit for a time, to be named therein, any dealing with such ship or share (*x*).

VIII. *Of Mortgages.*

A registered ship or any share therein may be made a security for a loan or other valuable consideration, by means of a mortgage, which must be in the form given by the act. And all such mortgages will be registered at the ship's port of registry (*y*), in the order of their production to the registrar, who will indorse on the mortgage a memorandum of the registry, and the date and hour thereof (*z*). The provisions of s. 66 do not prevent the owner who has executed a bill of sale, absolute in its terms, from showing that it was intended to operate as a security only (*a*). Equities against owners and mortgagees are not excluded by the act of 1854 (*b*). On the discharge of such mortgage being duly proved to the registrar, he will make an entry of the fact in the register-book, whereupon the estate which had passed to the mortgagee will vest in the parties entitled to the interest which had been mortgaged (*c*). Mortgagees will be entitled to priority according to the date at which each instrument is registered, and not according to the date of the instrument itself, notwithstanding any express, implied, or constructive notice (*d*). A mortgage may be made before registration of the ship, and if the mortgage is registered after registration of the ship it will be valid (*e*). An injunction may be obtained to restrain a sale by a mortgagee who takes it with notice of a charter-party (*f*).

The mortgagee will not, by reason of his mortgage, be deemed the owner, nor will the mortgagor be deemed to have ceased to be owner of the ship or share, except so far as may be necessary for making the security available (*g*). But every mortgagee will have power absolutely to dispose of the ship or share; no subsequent mortgagee, however, can exercise this power, except under the order of a court of competent jurisdiction, without the concurrence of every prior mortgagee (*h*). Under the analogous clauses of the repealed statutes, it was held, that a vendee (*i*), of the ship, or a mortgagee in possession (*j*), was entitled to the accruing freight, but that a mortgagee who had done no act towards taking possession, was not so entitled. So it was held, that a transfer of a share

(*x*) Sect. 65.

(*y*) Sect. 66.

(*z*) Sect. 67.

(*a*) *Ward v. Beck*, 32 L. J., C. P. 113.
The Innisfallen, L. R. 1, Adm. 72.

(*b*) Act of 1862, s. 3.

(*c*) Sect. 68.

(*d*) Sect. 69.

(*e*) *Bell v. The Bank of London*, 3 H. & N. 730.

(*f*) *De Mattos v. Gibson*, 28 L. J., Ch.

165.

(*g*) Sect. 70. See *Irving v. Richardson*, 2 B. & Ad. 193.

(*h*) Sect. 71. See *Hay v. Fairbairn*, 2 B. & A. 193.

(*i*) *Morrison v. Parsons*, 2 Taunt. 407. See also *De Pothonier v. De Mattos*, 27 L. J., Q. B. 260, and equitable jurisdiction in that case.

(*j*) *Kerswell v. Bishop*, 2 C. & J. 529; *Dean v. M'Ghie*, 4 Bingh. 45.

transferred a right to a corresponding share of the freight (*k*). It was also held, that where a transfer was in form absolute, a court of law might, nevertheless, look at the real nature of the transaction, and see that it was by way of mortgage only (*l*); and, on its appearing that the mortgagee had taken no steps to obtain possession, they held, that he was not entitled to the accruing freight (*m*).

No registered mortgage of any ship or share will be affected by any act of bankruptcy committed by the mortgagor after the registration of the mortgage, notwithstanding that the mortgagor may have the ship or share in his possession and disposition, and be the reputed owner thereof, but the mortgage will be preferred to the claim of the assignees (*n*).

Any transfer of the mortgage may be registered in the same way as the original mortgage (*o*), and in case of transmission, the acquired interest is also to be registered (*p*).

IX. *Certificates of Mortgage and Sale.*

The registered owner of any ship or share, if desirous of disposing thereof by way of mortgage or sale, at any place out of the country or possession in which the ship's port of registry is situated (*q*), may obtain from the registrar a certificate of mortgage or sale as the case may require (*r*); on registering, the names of the persons by whom the power is to be exercised (*s*), the maximum charge to be created or minimum price to be taken (if such restriction is wished), the place where the power is to be exercised, and the limit as to time (*t*). The power conferred by the certificate of mortgage must be exercised in conformity therewith; and every mortgage is to be indorsed thereon by a registrar or British consular officer. No *bond fide* mortgage made thereunder can be impeached by reason of the previous death of the grantor; and, if the certificate specifies the place at which, and a limit of time not exceeding twelve months within which the power is to be exercised, a *bond fide* mortgage, without notice, will not be prejudiced by the bankruptcy or insolvency of the grantor (*u*). Mortgages so indorsed on the certificate take priority over all mortgages subsequent to the registry of the certificate of mortgage; and mortgages under the certificate take priority *inter se* in the order of their indorsement (*v*). The discharge of any such mortgage may be

(*k*) *Lindsay v. Gibbs*, 22 Beav. 522; 2 Jur. (N. S.) 1039.

(*l*) *Myers v. Willis*, 17 C. B. 77; *Langton v. Horton*, 5 Beav. 9.

(*m*) *Gardner v. Cazenove*, 1 H. & N. 422.

(*n*) Sect. 72; 12 & 13 Vict. c. 106, s. 125.

(*o*) Sect. 73.

(*p*) Sects. 74, 75.

(*q*) Sect. 78.

(*r*) Sect. 76.

(*s*) Sect. 78.

(*t*) Sect. 77.

(*u*) Sect. 80.

(*v*) *Ibid.*

indorsed on the certificate, as provided for in the act; and the certificate of mortgage itself may be delivered up to the registrar who granted it, to be cancelled on registration of any unsatisfied mortgages effected by virtue of it (x).

Certificates of sale can only be granted for the sale of an entire ship, and are subject to the same conditions, in respect to the death, bankruptcy, and insolvency of the grantor, as the certificate of mortgage (y). If the ship is sold to a qualified British owner, the transfer must be by bill of sale in the prescribed form, and registry anew, stating all mortgages, will be necessary (z). If the ship is sold to a party not qualified to be the owner of a British ship, the certificates of sale and registry must be duly forwarded to the registrar of the ship's port of registry, whereupon the ship's registry will be considered closed, except as to any unsatisfied mortgage or certificate of mortgage (a); and in case of default in production of the certificates, the unqualified person will be considered, by British law, as having acquired no title to or interest in the ship. If no sale is made in conformity with the certificate, it is to be delivered up to be cancelled, after which it will be void to all intents (b).

The registered owner of any ship, or share, in respect whereof a certificate of mortgage or sale, specifying the place where the power is to be exercised, has been granted, may revoke the certificates by notice to be given, through the registrar of the ship's port, to the registrar or consular officer at such place (c).

X. Registry Anew and Transfer of Registry.

Whenever a registered ship is so altered as not to correspond with her registry, it will be necessary to register the alteration, and either a new certificate will be granted, or the alteration will be indorsed on the old one (d); unless the registrar of the port where the alteration takes place, or of the first port the ship enters, thinks fit to require registration anew; and if this port does not happen to be the ship's port of registry, a provisional certificate or indorsement will be granted for the ship's use until her return, so as to be registered anew (e). On failure of such registry anew, or registry of alteration, the ship will no longer be recognized as British (f).

On any change of ownership in the ship she may be registered anew, at the option of the owners (g). And the registry may be transferred from one port to another, on the application of all

(x) Sect. 80.

(y) Sect. 81.

(z) *Ibid.*

(a) *Ibid.*

(b) *Ibid.*

(c) Sect. 83.

(d) Sect. 84.

(e) Sects. 85, 86.

(f) Sect. 87. See ss. 100 and 516.

(g) Sect. 88.

parties registered either as owners or mortgagees (*h*), without prejudice to the rights of the several parties interested (*i*).

On sale of a ship to a qualified British owner, by virtue of a certificate of sale, registry anew is required (*j*).

XI. *Evidence—what shall be sufficient Evidence of Declarations, Certificates and Books of Registry.*

Great inconvenience having arisen from registering officers being served with subpoenas requiring them to produce the declarations and books of registry, the legislature has deemed it expedient to dispense with their attendance; and for that purpose has enacted that every person may, upon payment of a fee not exceeding one shilling, inspect the register book at any reasonable time during office hours (*k*). And that every register or declaration made in pursuance of the second part of the act in respect of any British ship, may be proved in any court of justice, or before any person having, by law, "or by consent of parties, authority to receive evidence, either by the production of the original, or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, or before any person having by law, or by consent of the parties, authority to receive evidence, as *prima facie* proof of all the matters contained or recited in such register when the register or such copy is produced, and of all matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced" (*l*). Copies on transcripts of registers kept under the direction of the Commissioners of Customs or the Board of Trade are made equivalent to the original registers (*m*). The act contains a similar provision in respect to documents in the custody of the Registrar-General of Seamen (*n*). See 7 Will. IV. & 1 Vict. c. 89, intituled, "An Act to amend the Laws relating to burning or destroying Buildings and Ships."

(*h*) Sect. 89.

(*i*) Sect. 91.

(*j*) Sect. 81.

(*k*) Sect. 92.

(*l*) Sect. 107.

(*m*) 18 & 19 Vict. c. 91, s. 15.

(*n*) Sect. 277.

II. *Of Masters and Seamen: their Wages, Desertion, &c.*, 17 & 18
Vict. c. 104, Part III.

Shipping Offices, &c., p. 1181.

Engagement of Seamen, and Ship's Articles, p. 1181.

Allotment of Wages, p. 1183.

Discharge, and Payment of Wages, p. 1183.

Legal Right to Wages, p. 1184.

Forfeitures and Desertion, p. 1187.

Official Logs, p. 1189.

Mode of Recovering Wages, p. 1190.

The legislature has thought fit to make several provisions relating to seamen employed in merchant ships, for the protection of the seamen, for the better securing their wages, and to guard against desertion. By the third part of the act (*o*), it is provided that shipping offices, superintended by shipping masters, are to be established at the principal seaports (*p*), for the purpose of keeping registries of the names and characters of seamen, of superintending and facilitating their engagement and discharge, and of securing their presence on board when engaged (*q*). In order to guard against the evils which have so long been felt of incompetent persons being entrusted with the command of ships, the act provides for the institution of examinations for masters and mates (*r*), and enacts, that no foreign-going ship, or home trade passenger ship, shall go to sea from any port in the kingdom, unless the master and one or more of the mates, according to the class of ship, is furnished with a proper certificate of competency of service (*s*).

Engagement of Seamen, and Ship's Articles.

The masters of all ships other than coasters of less than 80 tons registered tonnage, are bound to enter into an agreement, in the form sanctioned by the Board of Trade, with every seaman whom they carry to sea from any port in the kingdom (*t*). This agreement, usually known as the "ship's articles," must be dated at the time of the first signature, must be signed by the master before any seaman signs, and must contain the following particulars as terms thereof:—1. The nature, and as far as practicable, the duration of the intended voyage or engagement; 2. The number and description of the crew, specifying how many are engaged as sailors; 3. The time at which the seaman is to be on board, or to begin work; 4. The capacity in which each seaman is to serve; 5. The amount of wages he is to receive; 6. The scale of provisions; 7. Any regulations as to conduct, fines, and the

(*o*) See also the repealed statute 7 & 8 Vict. c. 112.

(*p*) Sect. 122.

(*q*) Sect. 124.

(*r*) Sect. 131.

(*s*) Sects. 134, 135, 136, 161, 162.

(*t*) Sect. 149. The agreement is of course several, not joint. See *Frazer v. Hutton*, 2 C. B., N. S. 512, as to its construction.

like, which have been sanctioned by the Board of Trade, and which the parties agree to adopt (*u*). The agreement is to be framed so as to admit stipulations, to be adopted at the will of the master and seamen in each case, as to advance and allotment of wages, and may contain any other stipulations not contrary to law (*v*). Colonial ships, however, may use here for single seamen, an agreement conformable to the law of the colony to which they belong (*x*). An omission on the part of the master in getting the articles signed by seamen, before carrying them to sea, although it will subject him to a penalty, will not render the ship unseaworthy, or the voyage illegal (*y*).

In the case of foreign-going ships, the following rules are to be observed :—The agreement (except for substitutes) is to be signed in duplicate by each seaman, in presence of a shipping master, who is to have it explained to him, and to attest his signature. One part is to be retained by the shipping master, and the other delivered to the master ; and the latter must contain a form for the signatures of substitutes and persons engaged after the first departure of the ship, in respect to whom special provisions are made (*z*). Foreign-going ships, however, may use running agreements to extend over two or more voyages in certain cases (*a*). In the case of home-trade ships, crews or single seamen may, if the master thinks fit, be engaged before a shipping master, as in the case of foreign-going ships, and if they are not so engaged, the master, before the ship puts to sea, or as soon after as practicable, must cause the agreement to be read over, and explained to each seaman, who is thereupon to sign it in presence of an attesting witness (*b*). The agreement, however, may be made with the owners to serve in one or more of their home-trade ships (*c*). And before the act a similar stipulation as to foreign-going ships was held to be legal (*d*). If seamen are engaged abroad at any place where there is a British consular officer, his sanction must be obtained and endorsed on the agreement, subject to the same rules as in respect of shipment before a shipping master (*e*), but an omission on this point will not avoid the agreement (*f*).

In order to prevent the agreement being tampered with, and to ensure its full protection to the seamen, the act provides that every erasure, interlineation, or alteration (except as to substitutes and persons engaged after the ship's first departure) shall be wholly inoperative unless proved to have been made with the consent of all persons interested, by the written attestation of a

(*u*) Sect. 149.

(*v*) *Ibid.*

(*x*) *Ibid.*

(*y*) *Redmond v. Smith*, 7 M. & G. 457 ; 516.

8 Scott, N. R. 250.

(*z*) Sect. 150.

(*a*) Sects. 151, 152, 153, 154.

(*b*) Sect. 155.

(*c*) Sect. 156.

(*d*) *Frazer v. Hatton*, 2 C. B., N. S.

(*e*) Sect. 160.

(*f*) *Frazer v. Hatton*, *supra*.

shipping master, justice, officer of customs, or other public functionary; or if abroad, of a British consular officer, or of two respectable British merchants, if there is no such officer (*g*). The master must, at the commencement of the voyage or engagement, cause a copy of the agreement (omitting signatures) to be duly posted up on board (*h*).

Any seaman may bring forward evidence to prove the contents of any agreement, or otherwise support his case, without producing or giving notice to produce the agreement, or any copy thereof, thus affording an important exception to the ordinary rules of evidence (*i*). Any seaman who has signed the agreement and is discharged before the commencement of the voyage, or the earning of a month's wages, without his own default, will be entitled in addition to such wages as he may have earned, to compensation not exceeding a month's wages, and may "recover such compensation as if it were wages duly earned" (*j*).

Allotment of Wages.

All stipulations for the allotment of any part of the wages during the seaman's absence, which are entered into before the commencement of the voyage, must be inserted in the agreement, and allotment notes must be in the form prescribed by the Board of Trade (*k*). These allotment notes, if made in favour of the wife, father, mother, grandfather, grandmother, child, grandchild, brother, or sister of the seaman, may, subject to certain restrictions, be sued on by such relations in the county court, or be enforced summarily before justices; but it seems that they could not be enforced by them in the superior courts (*l*).

Discharge, and Payment of Wages.

In the case of British foreign-going ships, all seamen discharged in the United Kingdom must, and in the case of home-trade ships may, be discharged and receive their wages in presence of a shipping master, unless some competent court otherwise directs (*m*). The master must enter all deductions in a book to be kept for that purpose, and which must, if required, be produced upon the hearing before any competent authority of any question relating to such payments; and he must deliver an account of the wages in the prescribed form at least twenty-four hours before discharge of the seaman (*n*). The master or owner and any of the crew are entitled

(*g*) Sect. 163.

(*h*) Sect. 166.

(*i*) Sect. 165.

(*j*) Sect. 167.

(*k*) Sect. 168. The fact of the advance being made in clothes, &c., and not in

money, will not vitiate an advance note. *M'Kane v. Johnson*, 12 L. J., C. P. 133.

(*l*) Sect. 169.

(*m*) Sect. 170.

(*n*) Sect. 171.

to refer any question whatever which may arise between them, and which both parties may agree in writing so to submit, to a shipping master, who must hear and decide such question ; and every award (for which no stamp is required) so made by him will be binding on both parties, and will, in any legal proceedings which may be taken in the matter, be deemed conclusive as to the rights of the parties. Any document purporting to be such submission or award, will be *prima facie* evidence thereof (*o*).

Upon completion before the shipping master of any discharge and settlement, the master or owner and each seaman must respectively sign, in the presence of the shipping master, a mutual release in the prescribed form of all claims in respect to the past voyage or engagement. This document the shipping master is to sign and attest, whereupon it will operate as a mutual discharge and settlement of all demands between the parties in respect of the past voyage or engagement ; and in cases in which discharge and settlement before a shipping master are required, no payment, receipt, settlement or discharge otherwise made, will operate as a release or satisfaction of any claim, or be admitted as evidence thereof (*p*). The shipping master is to retain the original, and, after completion of the business, transmit it to the Registrar-General of seamen to be recorded and preserved (*q*) ; and copies certified either by the shipping master or the registrar-general, are receivable in evidence and have the same effect as such original (*r*).

The shipping master must, if required, sign and give to the master an account of the whole amount paid before him, which will be evidence as between the master and his employers of the payments therein mentioned (*s*).

Upon every discharge before a shipping master, the master is to sign a report as to the seaman's conduct, character, and qualifications, to be recorded by the Registrar-General of Seamen (*t*).

Legal Rights to Wages.

A seaman's right to wages and provisions is taken to commence either at the time at which he commences work, or at the time specified for such commencement, or presence on board, whichever first happens (*u*). No seaman can, by agreement, forfeit his lien on the ship, or forego any remedy for the recovery of wages ; and any stipulation in the agreement inconsistent with the act, or for the abandonment of wages on loss of the ship, or of any right in the nature of salvage, will be wholly inoperative (*v*). The rule quaintly

(*o*) Sect. 173.

(*p*) Sect. 175.

(*q*) Sect. 277.

(*r*) Sects. 175, 277.

(*s*) Sect. 175.

(*t*) Sect. 176. As to forgery of cha-

acter, &c., see the section, and *R. v. Wilson*, 6 W. R. 503.

(*u*) Sect. 181.

(*v*) Sect. 182. The master has no claim either for his freight, on the accruing wages or for monies disbursed for the use

expressed, by saying that "freight is the mother of wages" (*x*), has been abrogated, so far as British and colonial ships are concerned, and in such ships the right to wages is no longer dependent on the earning of freight; but in case of wreck, or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship, cargo, and stores, will bar his claim (*y*). If the seaman dies during the voyage, the wages will ordinarily be payable *pro rata* (*z*). Where the service terminates prematurely, on account of the wreck or loss of the ship, or on account of the seaman's being left on shore under a certificate of inability, or volunteering into the navy without having deserted, he will be entitled to wages for the time of service prior to such termination, but not beyond it (*a*). Wages do not accrue for any time during which the seaman refuses to work, nor during his imprisonment for any offence committed, unless the court otherwise order (*b*). An embargo does not put an end to the contract of the seamen for wages, or suspend their right to wages during its continuance, if the seaman serves out the voyage (*c*). But where the service is wholly put an end to by a superior authority, as by the seaman being sent home by a naval court as a witness in a case of felony, wages will not be payable beyond the time of his leaving the ship (*d*). But if the seaman remains on board he will be entitled to his full wages, notwithstanding that he has been unable to work on account of illness or accident (*e*); and if he receives any hurt or any injury in the service of the ship, the expenses of medical attendance and subsistence until he is cured, brought home, or dies; and if he dies, of his burial, are to be defrayed by the owners (*f*). So, also, all medicines and medical and surgical attendance given on board are to be paid for by the owners (*g*); who are bound to provide certain medicines for the ship's use (*h*), in default of which an action may be maintained by any seaman whose health suffers (*i*).

In a case where the defendant gave a written promise to pay the plaintiff's intestate a gross sum (thirty guineas), provided he *proceeded, continued, and did* his duty as second mate in a certain ship, from Jamaica to Liverpool, and the intestate, who had regularly performed his duty, died about a month after the ship had

of the ship. *Gibson v. Ingo*, 6 Hare, 112. This does not apply to a stipulation made by seamen belonging to a ship to be engaged in salvage service. 25 & 26 Vict. c. 63, s. 18.

(*x*) As to this, see Abbott, 454. The master was not within the rule. *Hawkins v. Twissell*, 5 E. & B. 883.

(*y*) Sect. 183.

(*z*) See *Cutter v. Powell*, 6 T. R. 320; 2 Smith's Lead. Cas. 1; *Armstrong v. Smith*, 1 N. R. 299; Abbott, 453.

(*a*) Sects. 185, 215; and see *Taylor v. Laird*, 1 H. & N. 266. As to right of parties holding bills given by masters in

payment of wages required to be paid by s. 209, see 25 & 26 Vict. c. 63, s. 19.

(*b*) Sect. 186.

(*c*) *Beale v. Thompson*, 4 East, 546; 1 Dowl. 299; *Johnson v. Broderick*, 4 East, 566.

(*d*) *Melville v. De Wolf*, 4 E. & B. 844.

(*e*) Abbott, 450; *Chandler v. Grieves*, 2 H. Bl. 606.

(*f*) Sect. 228.

(*g*) *Ibid.*

(*h*) Sect. 224.

(*i*) *Couch v. Steel*, 3 E. & B. 402.

sailed, and before her arrival at Liverpool; and it appeared, that the common rate of wages was 4*l.* per month, when the party was paid in proportion to the time he served, and that the voyage was generally performed in two months: it was held that the representative of the intestate was not entitled to recover any wages on the *express* contract, because it was an entire contract, and not divisible; nor on an *implied* contract, by reason of the axiom of law, that where the parties have entered into an express contract, no other can be implied (*j*). During a voyage the ship was wrecked, and the captain gave the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging, at the same time, that he had hired them by the month. It was held, that, under these circumstances, no action for wages could be maintained by the mariners against the captain, at least, without proving that they first made a demand upon the owners (*k*).

There is no implied warranty by the master or owners to the seaman of seaworthiness; consequently, a count alleging that the plaintiff engaged the defendant to serve on board a British ship, as a common seaman, and laying for breach, that the vessel was leaky and unseaworthy, whereby the plaintiff was continually wet, and was subjected to excessive labour, and became unwell, is bad on demurrer (*l*).

The wages are payable, in the case of a home-trade ship, within two days of the termination of the agreement, or of the discharge, whichever first happens; and in the case of other ships (except certain whalers and partnership ventures) within three days of the delivery of the cargo, or five days of the seaman's discharge, whichever first happens (*m*). In all cases, however, the seaman is entitled to be paid at the time of his discharge, one-fourth of the balance due to him; and in case of default in any of the above cases, the master or owner will be liable to pay to the seaman a sum not exceeding two days' pay, for every day not exceeding ten during which the payment is delayed, without sufficient cause, such sum to be recoverable as wages (*n*). This extra payment, however, will not become due where the wages are kept back on account of an untenable claim to a further sum raised by the seaman, notwithstanding that the sum really due has not been tendered (*o*). The master may legally dismiss a seaman for mutiny (*p*).

When a written agreement is made, a seaman cannot recover any money agreed to be given in reward for his service which is not specified in the articles (*q*). Thus, where a sailor brought an

(*j*) *Cutter v. Powell*, 6 T. R. 320; 2 Smith's Lead. Cas. 1. See also *Appleby v. Dods*, 8 East, 300; *Jesse v. Roy*, 1 C. M. & R. 316; 1 Lord Raym. 639, 739; *Mills v. Blackall*, 11 Q. B. 358.

(*k*) *Forsboon v. Kruger*, 3 Campb. 197.

(*l*) *Couch v. Steel*, *supra*.

(*m*) Sect. 187.

(*n*) *Ibid.*

(*o*) *Frazer v. Hatton*, 2 C. B., N. S. 512.

(*p*) *Renno v. Bennett*, 3 Q. B. 768.

(*q*) *Abbott*, 447.

action against the master, and declared on an agreement, whereby it was stipulated, that the sailor should have a certain sum per month during a voyage from London to Africa, and thence to the West Indies, and also so much money as should be the average price of a negro slave in the West Indies, but in the ship's articles no mention was made of the money to be paid to the plaintiff as the average price of the negro slave; it was held, that the additional perquisites of the average price of a negro slave could only be considered as wages, and therefore ought to have been inserted in the written agreement (*r*). In like manner it has been held, that a sailmaker, serving in a ship belonging to the East India Company, cannot recover, upon a promise to pay him a monthly sum, beyond the wages mentioned in the ship's articles which had been signed by him as a sailmaker (*s*). Seamen, by signing the ship's articles, undertake to do all they can under all the emergencies of the voyage, and sell all their services until it shall be completed. Consequently, a promise by the master in the course of the voyage, to pay wages beyond those stipulated for is void for want of consideration: even though the ship has become short-handed by desertion, and the master signs fresh articles at the increased rate (*t*). However, it has been decided in a recent case, that if the ship has become so short-handed as to make it dangerous to life to go to sea in her, it is not incumbent on the seaman to go on, and that, in such case, an agreement made in port to go to sea and work the ship in that state at an increased rate of pay is binding (*u*).

Forfeitures and Desertion.

Any seaman, who has been lawfully engaged, committing any of the following offences, will be liable to be punished as follows:—

1. For desertion, he will be liable, in addition to a term of imprisonment, to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages which he has then earned, and also, if the desertion takes place abroad, at the discretion of the court, to forfeit all or any part of the wages he may earn in any other ship until his next return to the United Kingdom, and to satisfy any excess of wages paid to any substitute engaged in his place (*x*).

2. For neglecting, without reasonable cause, to join his ship, or proceed to sea in her, or for absence without leave, &c., in addition

(*r*) *White v. Wilson*, 2 B. & P. 116.

(*s*) *Elsworth v. Woolmore*, Abbott, 447; 5 Esp. 84.

(*t*) *Stilk v. Meyrick*, 2 Campb. 317; *Thompson v. Havelock*, 1 Campb. 527; *Harris v. Watson*, Peake, 72; *Harris v. Carter*, 3 E. & B. 559; *Frazer v. Hatton*, 2 C. B., N. S. 525. See *Clutterbuck v. Coffin*, 4 Scott, N. R. 509; 3 M. & G.

842; Car. & M. 273, as to a promise by a captain in the navy to pay his cook wages in addition to his pay.

(*u*) *Hartly v. Ponsonby*, 7 E. & B. 872; *The Mobile*, 3 Jur. (N. S.) 893.

(*x*) Sect. 243. This section varies materially from the corresponding provision of the repealed statute 7 & 8 Vict. c. 112, s. 9.

to imprisonment, to forfeit, at the discretion of the court, a sum not exceeding two days' pay, and six days' pay in addition for every twenty-four hours' absence, or the expenses of a substitute (*y*).

3. For quitting the ship without leave after her arrival, but before she is placed in security, to forfeit a sum not exceeding a month's pay (*z*). Where a seaman who had signed the articles, absolutely quitted the ship without any *animus revertendi* after she had arrived and been moored at her port of delivery, but before her cargo had been discharged; it was held, that he did not thereby incur a total forfeiture of his wages, but only of a month's wages, under the corresponding section of a repealed statute (*a*).

4. For wilfully damaging the ship, stores or cargo, or embezzlement thereof, to forfeit out of his wages, the loss thereby sustained, as well as imprisonment (*b*).

5. For causing loss or damage by smuggling, on conviction, to reimburse the master or owner; and the whole or any part of the wages may be retained in satisfaction (*c*). Various other breaches of discipline will also subject the seaman to different forfeitures (*d*).

A formal entry of the above offences is to be made and signed according to the act in the official log and read over, or a copy given to the offender, and his reply, if any, is also to be entered. In any subsequent legal proceeding, these entries must, if practicable, be produced and proved, or the court may, in default, refuse to receive evidence of the offence (*e*).

When desertion takes place abroad, it must be certified on the ship's articles by the British consul, or in his absence, by two respectable resident merchants (*f*), on production of the entry in the official log. The consul or merchants are to make and certify copies of the entry in the log and of the certificate of desertion, which are to be transmitted to the Registrar-General of Seamen, and such copies purporting to be so made and certified, and certified to have come from the custody of the registrar, are, in legal proceedings relating to such desertion, to be received as evidence of the entries (*g*). In questions as to forfeiture of wages for desertion, it is sufficient for the party insisting on the forfeiture to show that the seaman was engaged in or belonged to the ship, that he quitted her before completion of the voyage or engagement, and that the desertion has been duly entered in the official log, after which proof it lies on the seaman to produce a proper certificate of discharge, or show that he had sufficient reason for leaving his ship.

Where the seaman contracts for wages by the voyage, by the

(*y*) *Ibid.*

(*z*) *Ibid.*

(*a*) *M'Donald v. Jopling*, 4 M. & W.

285.

(*b*) Sect. 243.

(*c*) Sect. 243.

(*d*) *Ibid.*

(*e*) Sect. 244.

(*f*) Sect. 207.

(*g*) Sect. 249.

run, or by the share, and not by time, the forfeitures are to be calculated proportionately (*h*).

All clothes, wages, &c., forfeited for desertion, are to be applied, in the first instance, towards the reimbursement of the expenses caused to the ship by the desertion, and subject thereto to be paid into the exchequer, to go to the consolidated fund. All other forfeitures of wages will, in the absence of specific directions to the contrary, be for the benefit of the master or owner by whom the wages are payable. Wages forfeited for desertion, if earned subsequently, may be recovered by the master or owner of the ship from which the desertion takes place, or his agent, in the same manner as the deserter might otherwise have recovered them (*i*). And questions concerning the forfeiture of or deductions from wages, may be determined in proceedings for wages, notwithstanding that the offence may also be made punishable by imprisonment, and that it has not been proceeded for criminally (*j*).

Entering or being entered into the service of her Majesty, on board any of her Majesty's ships, will not occasion a forfeiture of clothes or wages, nor is it to be deemed a desertion (*k*). Being compelled to quit the ship through the inhuman treatment of the master (*l*), or on account of the insufficiency of the provisions (*m*), or being dismissed without any lawful cause, will not be deemed desertion (*n*). A majority of the Court of Queen's Bench, however, have held, that a threat by the master to sell a black seaman as a slave abroad, will not justify desertion, unless at a place where slavery is *legal* (*o*). So where the seaman is impressed into the royal service, he will be entitled to receive a proportion of his wages up to the time of impressing (*p*), but not beyond (*q*).

Official Logs.

An official log of every ship, in a form sanctioned by the Board of Trade, must be kept (*r*), in which every entry must be made as soon as possible after the occurrence to which it relates; and, if not made on the day, the dates both of the occurrence and of the entry must be inserted, but in no case may an entry of any occurrence, happening previously to the ship's arrival, be made after

(*h*) Sect. 252.

(*i*) Sect. 253.

(*j*) Sect. 254.

(*k*) Sect. 214, *ante*, p. 1185.

(*l*) *Limland v. Stephens*, 3 Esp. N. P. C. 269, *Kenyon*, C. J.; *Edward v. Trevellick*, 4 E. & B. 59.

(*m*) *Castilia, Steward*, 1 Hagg. Adm. Rep. 59; *Abbott*, 136, 450.

(*n*) *Sigard v. Roberts*, 3 Esp. N. P. C. 72, *Eldon*, C. J. See *Sherman v. Bennett*, M. & Malk. 489.

(*o*) *Edward v. Trevellick*, 4 E. & B.

59. *Sed quere*. The possibility of a sale, not its legality, would seem to be the correct criterion.

(*p*) Sect. 215. See *Wiggins v. Ingleton*, 2 Lord Raym. 1211.

(*q*) *Clements v. Mayborn*, B. R., T. 24 Geo. III., *Abbott*, 451; *S. C. nom. Clements v. Mavor*, B. P. B., *Dampier MSS.*, L. I. L., No. 333; but the voyage must, where earning freight was necessary, have been completed, 2 Campb. 320, n.

(*r*) Sect. 280.

the lapse of twenty-four hours after arrival (*s*). The master is required, amongst other things, to enter every offence committed by any of the crew for which it is intended to prosecute or enforce a forfeiture or fine, together with a statement of the reading over of the entry to the offender, and his reply, if any (*t*). The entry must be signed by the master and mate, or some other of the crew (*u*), and will be received in evidence, subject to all just exceptions (*x*). At the termination of the voyage the official log is delivered up to the shipping master, and transmitted in course to the Registrar-General of Seamen (*y*). Certified copies of all documents in the custody of the Registrar-General of Seamen are receivable in evidence, and have the same effect as the originals in all cases in which the production of the original is not essential (*z*).

Mode of Recovering Wages.

It only remains to state the remedies which the law has provided for the recovery of seamen's wages. If the hiring be on the usual terms, and made by word or by writing only, and not by deed, the seamen, or any one or more of them, and every officer (the master now included) (*a*), may sue in the Court of Admiralty; and may, by the process of that court, arrest the ship as a security for their demand, or cite the master or owner (*b*) personally to answer to them (*c*). But if the agreement be by deed, and the terms of such agreement are not the usual terms, then the only remedy is in the common law courts. But whether the party sue in the Court of Admiralty (*d*), or bring an action in the courts of common law (*e*), in both cases the suit or action must be commenced within six years next after the cause thereof has accrued; unless the party suing should have been under any of the disabilities mentioned in the Statute of Limitations,—as infancy, absence beyond the seas, &c. In proceedings against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges; for the labour of the seamen, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it which otherwise they could not have had (*f*). In the courts of common law the seamen severally may sue either the master, as the person im-

(*s*) Sect. 281.

(*t*) Sect. 282.

(*u*) Sect. 283.

(*x*) Sect. 285.

(*y*) Sect. 286.

(*z*) Sect. 277.

(*a*) Sect. 191.

(*b*) As to effect of a change of ownership whilst the ship is at sea, see *Robins v. Power*, 27 L. J., C. P. 256; 4 C. B., (N. S.) 778.

(*c*) Abbott, 481, cites Winch. 8; 2 Vent. 181; 8 Mod. 379; 2 Lord Raym. 1206; 1 Str. 707; Say. 136; 1 Lord Raym. 632; Salk. 33; 2 Str. 858; 1 Barnard. 297; 2 Dods. 104; 3 Hagg. 379; 1 Say. 136; 1 Lord Raym. 632; 2 Str. 937.

(*d*) Stat. 4 Ann. c. 16, ss. 17, 18, 19.

(*e*) 21 Jac. I. c. 16, ss. 3, 7.

(*f*) Abbott, 486.

mediately contracting with them, and answerable to them, or the owners, as the persons virtually contracting with them through the agency of the master, and answerable for the performance of his engagement (*g*). If foreign sailors stipulate in their own country, before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them abroad in deduction of their wages, such stipulation is binding; and an action cannot be maintained by the seaman for his wages in the courts of this country (*h*). In an action against the defendants, as part owners, for seamen's wages, the question arose, whether A. and B. being partners, and also part owners of a vessel, the admission of A., as to a subject of co-part ownership, but not of co-partnership, was binding on B.? And Lord *Ellenborough* held that it was not (*i*).

Where the wages sought to be recovered do not exceed 50*l.*, they may be recovered summarily before two justices, and in Scotland, also, before the sheriff (*k*): and no suit or proceeding for wages for an amount less than 50*l.* will lie in the admiralty or superior courts, unless the owner is bankrupt or insolvent (*l*), or the ship is under arrest, or is sold under authority of the court, or unless such justices refer the case, or neither the owner nor master is or resides within twenty miles of the place where the seaman is discharged or put ashore (*m*). But this defence must in an action by a seaman for wages be pleaded specially (*n*). Where the voyage or engagement is to terminate here, no wages are recoverable abroad, unless the seaman is duly discharged with the written consent of the master, or proves such ill-usage on his part, or by his authority, as to warrant reasonable apprehension of danger to life; and if the seaman, on his return, proves that the master or owner has been guilty of any conduct, or default, which, but for this provision, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he will be entitled to recover, in addition to his wages, compensation not exceeding 20*l.* (*o*).

The master has the same remedy for wages as an ordinary seaman (*p*).

Seamen's wages are not liable to any process of attachment or

(*g*) See note (*e*), *supra*, p. 1190.

(*h*) *Johnson v. Machielsne*, 3 Campb. 44.

(*i*) *Juggers v. Binnings*, 1 Stark. N. P. C. 64.

(*k*) Sect. 188. Under the corresponding sections of 7 & 8 Vict. c. 112, which are worded a little differently, it was held, that the summary remedy thereby given could be enforced only by the seaman himself, and not by his personal representative after his death. *Hollings-*

worth v. Palmer, 4 Ex. 267.

(*l*) See *The Princess Royal*, 2 Rob. Adm. Rep. 373; *The Great Northern*, *ibid.* 509.

(*m*) Sect. 189.

(*n*) *Johnston v. Hilberry*, 3 H. & C. 328.

(*o*) Sect. 190.

(*p*) Sect. 191. See also *Gibson v. Ingo*, 6 Hare, 112; *The Repulse*, 2 Rob. Adm. Rep. 398; *The Milford*, 1 Swa. 362.

arrestment; and payment to the seaman will be good notwithstanding any prior assignment he may have made (*q*).

III. Pilotage (*Part V.*).

The general jurisdiction of pilotage authorities is to be retained (*r*). The pilotage authorities or the Board of Trade may arrange the limits or transfer the jurisdiction (*s*), and may also grant exemptions from compulsory pilotage (*t*). The master or mate, if examined and passed, is to receive a pilotage certificate from the pilotage authorities enabling him to pilot particular ships within limits, which must be within their jurisdiction (*u*). This certificate must be renewed annually (*x*). The Board may grant certificates on the pilotage authorities refusing to do so (*y*), subject to exemption and alteration to be made by the authorities. Compulsory pilotage is to remain in those districts in which it existed before the passing of the act (*z*). Home trade passenger ships are to employ qualified pilots unless they have certificated masters or mates (*a*). The rights, privileges, and remuneration of pilots are defined by ss. 356—365. An unqualified pilot may in some cases take charge of a ship, *viz.*, when no qualified pilot has offered to do so, or when a ship is in distress, or to change the mooring of a ship in port (*b*). The persons liable to pay pilotage dues are the owner or master, or such consignee or agent thereof as have paid or are liable to pay any other charges on account of the ship in either the port of discharge or clearance outwards, and the amount may be recovered summarily before two justices or a stipendiary magistrate (*c*). Offences of pilots are provided for by ss. 365 to 367. The Trinity House pilotage powers are regulated by ss. 368—387. No owner or master of any ship is answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in the charge of such ship within any district where the employment of such pilot is compulsory (*d*).

The following ships when not carrying passengers are exempted from compulsory pilotage in the London district, and in the Trinity House outport districts: 1. Ships employed in the coasting trade of the United Kingdom. 2. Ships of not more than sixty tons burden. 3. Ships trading to Boulogne, or to any place in Europe

(*q*) Sect. 233.

(*r*) Sect. 331.

(*s*) Sect. 333; 25 & 26 Vict. c. 63, s.

39.

(*t*) Sect. 332; 25 & 26 Vict. c. 63, s.

39.

(*u*) Sect. 340.

(*x*) Sect. 341.

(*y*) Sect. 342.

(*z*) Sect. 353.

(*a*) Sect. 354.

(*b*) Sect. 362.

(*c*) Sect. 363.

(*d*) Sect. 388. See *The Maria*, 1 W. Rob. 95.

north of Boulogne. 4. Ships from the Channel Islands laden with stone. 5. Ships navigating within the limits of the port to which they belong. 6. Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein (e).

Although a vessel may be within her own port at the time of a collision, yet if she is under the charge of a pilot compulsorily taken on board, the shipowner will not be responsible for the pilot's negligence (f).

IV. *Of the Limitation of the Liability of Ship-Owners, and of their Liability for Repairs, &c. (Part IX.)*

No owner or part owner of any sea-going ship is liable, to any extent whatever, for damage to the cargo by fire, if it happen without his actual fault or privity; or for loss or damage to gold, silver, diamonds, watches, jewels, or precious stones by robbery or embezzlement, unless the true nature and value of the articles is, at the time of shipment, inserted in the bills of lading, or otherwise declared in writing to the master or owner (g).

The owners shall not in cases where all or any of the following events occur without their actual fault or privity, *i. e.* :—1. Loss of life or personal injury to any person carried in such ship. 2. Damage or loss to goods, merchandize or other things on board. 3. Loss of life or personal injury, caused by improper navigation of the ship, to any person in any other ship or boat. 4. Loss or damage, caused by improper navigation of the ship, to any other ship or boat, or to any goods, merchandize or things on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury either alone or together with loss or damage to ships, goods, &c., to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, &c., whether there be in addition loss of life or personal injury or not, to an aggregate exceeding 8*l.* a ton (h). The liability, however, for loss of life, personal injury, or loss of or damage to

(e) Sect. 379. See also 6 Geo. IV. c. 125, s. 59, for other exemptions from the compulsory employment of pilots. See *R. v. Stanton*, 8 E. & B. 445; *The Wesley*, 1 Lush. 268; *The Stettin*, 31 L. J. Ad. 208; *Tyne Commissioners v. General Steam Navigation Company*, L. R. 2 Ex. 71.

(f) *General Steam Navigation Company v. British and Colonial Steam Navigation Company*, L. R. 3, Ex. 330.

(g) 17 & 18 Vict. c. 104, s. 503. See

Morewood v. Pollock, 1 E. & B. 743; *Williams v. African Steam Ship Company*, 1 H. & N. 300; *Bourne v. Gatliff*, 11 Cl. & F. 45; 8 Scott, N. R. 604; 7 M. & G. 850; *Gibbs v. Potter*, 10 M. & W. 72.

(h) 25 & 26 Vict. c. 63, s. 54. The fault of one owner does not deprive his co-owner of his exemption from unlimited liability. *The Spirit of the Ocean*, 34 L. J., Adm. 74.

goods, will be the same on each distinct occasion as if no other loss, injury or damage had arisen (*i*). The master's list or the duplicate list of passengers delivered to the customs officers under s. 16 of the Passenger Act, 1855 (18 & 19 Vict. c. 119), is sufficient proof (in case of a proceeding against the owner in respect of loss of life of a passenger) that the person killed was a passenger at the time of his death (*k*).

In cases of loss of life or personal injury, the Board of Trade is empowered to institute proceedings before a jury, presided over by the sheriff, in which the damages are to be assessed at 30*l.* for each death or injury, subject to any compromise the Board of Trade may make (*l*). But any person dissatisfied with the amount may, on repayment of the statutory damages, sue on his own account, subject to liability to pay costs to the defendant, as between attorney and client, in the event of his failing to recover double the amount of the statutory damages (*m*). No action, however, can be maintained for loss of life or personal injury occasioned by an accident until the Board of Trade inquiry has been concluded, or the Board of Trade has refused to institute proceedings (*n*).

The captain of a ship is the general agent of the owner for all things rendered necessary by the maritime exigencies of a voyage, and he is of necessity also the agent for his owners to do all which must be done promptly for the preservation of the ship (*o*). But generally the ownership of the ship does not render the owners liable either in contract or in tort for the acts of the master and crew or other persons in charge of the vessel, unless the owners are the employers of such persons. Proof of ownership is, however, sufficient *prima facie* evidence to prove that the owners are the employers (*p*).

The registered owner of a ship is not liable for repairs, unless actually done upon his credit, as "it is perfectly well settled now, that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship" (*q*). The register is *prima facie* but not conclusive evidence of ownership, and the real state of the case may be looked to in order to ascertain whether what appears to be a legal title is really so (*r*). "The question is, with whom was the contract made: and that depends on another question, now very well understood, *viz.*,

(*i*) 17 & 18 Vict. c. 104, s. 506.

(*k*) 25 & 26 Vict. c. 63, s. 56.

(*l*) *Ibid.* ss. 507, 508, 509.

(*m*) *Ibid.* s. 511. See *Glaholm v. Barker*, 35 L. J., Ch. 657.

(*n*) *Ibid.* s. 512. As to the apportionment of damages between several claimants, and against several part owners, &c., see sects. 513, 514, 515.

(*o*) *Mitcheson v. Oliver*, 5 E. & B. 443 ;

25 L. J., Q. B. 39.

(*p*) *Hibbs v. Ross*, L. R. 1, Q. B. 543. See, however, *Pearson v. Nell*, 12 L. T. 607.

(*q*) Judgment in *Mitcheson v. Oliver*, 5 E. & B. 443.

(*r*) *Myers v. Willis*, 17 C. B. 77 ; 18 C. B. 886 ; *Mackenzie v. Pooley*, 11 Exch. 638.

whether the master was the agent of the party sought to be fixed with liability in respect of a contract made by him" (s). So also, the fact of a man's being registered part owner of a ship, does not give his co-owner or the broker authority to pledge his credit for necessary repairs (t). So also, the fact of the master being registered as such, is not sufficient to charge the registered owner, unless he has sanctioned the master's appearing to be *his* master acting for him, and the work was done on the faith of the master being *his* master (u). In *Jennings v. Griffiths* (x), Lord *Tenterden* held that legal ownership is *prima facie* evidence of liability (y), which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owners having ceased to interfere with the management of the ship. As where A., the managing owner of a ship, mortgaged his share to B., who procured the transfer to be duly indorsed on the certificate of registry, but A. continued in the management as before, and gave orders for repairs and stores, and B. did not take possession or interfere in the concerns of the ship; it was held, that B. was not liable for such repairs and stores so ordered by A. (z). So where a steam-vessel was let by charter-party for twelve months, the registered owners engaging to keep the engine in repair, but the charterer binding himself to do all other repairs, to pay all wages, and charges of navigating, &c., and to indemnify the owners against all debts, costs, damages, expenses, &c., incurred in respect of the charter-party and employment of the vessel. The owners were to appoint the engineers. The charterer, who acted as captain, had repairs done to the vessel by persons unacquainted with the contract: it was held, that no action lay, in respect of those repairs, against the registered owners (a). So a party who takes a share in a ship, under a conveyance, void for want of conformity with the provisions of the Registry Acts, is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as owner (b).

The master of a ship has authority by law to pledge the credit of his owner, resident in England, not only for necessaries, but also for *money* advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage (c); but the case must be one

(s) *Per Jervis*, C. J., *ibid.* 17 C. B. 103.

(t) *Brodie v. Howard*, 17 C. B. 109; *Hackwood v. Lyall*, 17 C. B. 124. See *Preston v. Samplin*, 2 H. & N. 363.

(u) *Frost v. Oliver*, 2 E. & B. 301; *Mitcheson v. Oliver*, 5 E. & B. 419.

(x) 1 Ry. & M. 42.

(y) See, too, *Fletcher v. Reid*, and *Cox v. Reid*, 1 Ry. & M. 199, 202.

(z) *Briggs v. Wilkinson*, 7 B. & C. 30; *Jennings v. Griffiths* and *Briggs v. Wil-*

kinson were recognized in *Curling v. Robertson*, 8 Scott's N. R. 12; 7 M. & G. 336. See *Holmes v. Preston*, 2 H. & N. 684.

(a) *Reeve v. Davis*, 1 A. & E. 312; 3 Nev. & M. 873, recognizing *Briggs v. Wilkinson*.

(b) *Harrington v. Fry*, 2 Bingh. 179.

(c) *Organ v. Brodie*, 10 Ex. 449; *Arthur v. Barton*, 6 M. & W. 138, recognized in *Weston v. Wright*, 7 M. & W. 396. See *ante*, p. 969.

where the necessity is pressing, and the master and owner cannot communicate without very great prejudice and delay (*d*); and whether it was so or not is a question for the jury (*e*): but the owner of a ship is not liable for money advanced to the master, although it has been properly expended by the master for the purpose of the ship, unless the money was borrowed by the master expressly for that purpose (*f*). And where money is lent and goods supplied to the master at a foreign port, the onus is on the plaintiff to prove that they were necessities (*g*).

The tenth part of the Merchant Shipping Act, 1854 (ss. 517 to 543), regulates the legal procedure. Any document required by the act to be executed in the presence of or to be attested by any witness, may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness (*h*). The judge of any court of record, or of the Court of Admiralty, may, where damage has been caused by a foreign ship, detain it, when found within three miles of the coasts of the United Kingdom, until security has been given to abide the event of any legal proceedings (*i*). In certain cases a commissioned officer of the army or navy may detain the ship whilst the application is made to a judge (*k*). The person giving security is to be made the defendant (*l*).

This act was amended by "The Merchant Shipping Act Amendment Act, 1855" (18 & 19 Vict. c. 91), and these acts were further amended by "The Merchant Shipping Act Amendment Act, 1862" (25 & 26 Vict. c. 63). Some of these amendments have been already noticed. Amongst others there is a very important alteration made in the enactments under the heading of "Safety" (part IV. of The Merchant Shipping Act); sections 295 to 299, both inclusive, of the act of 1854, are repealed by the act of 1862, and in lieu thereof there is an enactment of regulations concerning lights, fog signals, and sailing rules, which the Board of Trade and the Board of Admiralty have power to alter or add to (*m*). All owners and masters are bound to obey them (*n*), and if collision ensue from breach of these regulations the ship committing such breach is, *prima facie*, to be deemed in fault (*o*).

(*d*) *Per Patteson, J.*, in *Johns v. Simons*, 2 Q. B. 425; but see *Edwards v. Havill*, 14 C. B. 107.

(*e*) *Arthur v. Barton*, 6 M. & W. 138.

(*f*) *Thacker v. Moates*, 1 M. & Rob. 79; *Beldon v. Campbell*, 6 Ex. 886.

(*g*) *Mackintosh v. Mitcheson*, 4 Exch. 175.

(*h*) Sect. 526.

(*i*) Sect. 527.

(*k*) Sect. 528.

(*l*) Sect. 529.

(*m*) 25 & 26 Vict. c. 63. s. 25.

(*n*) Sect. 26.

(*o*) Sect. 29. Section 28 means the same; see *Grill v. General Iron Screw Collier Company*, L. R. 1, C. P. 611.

CHAPTER XXXVI.

SLANDER.

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I. *Scandalum Magnatum.*

SLANDER spoken and published of a peer is termed *scandalum magnatum*. The 3 Edw. I. Westm. 1, c. 34, commands, "That none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people, or the great men of the realm; and he that doth so, shall be taken and kept in prison, until he hath brought him into the court which was the first author of the tale" (a). And by Ric. II. c. 5, "None shall devise or speak false news, lies, or other such false things of the prelates, dukes, earls, barons, and other noble and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or the other, and other great officers of the realm; and he that doth, shall incur the pain of the stat. Westm. 1, c. 34." And by 12 Ric. II. c. 11, "When any such [person, as is described in the foregoing statutes] is taken and imprisoned, and cannot find him by whom the speech be moved, he may be punished by the advice of the council, notwithstanding the statute of Westm. 1, c. 34, and 2 Ric. II. c. 5." The foregoing statutes do not expressly give an action; yet it has been held, that the party injured may maintain an action on the 2 Ric. II. c. 5, upon the principle of law, that an action lies on a statute, which prohibits the doing an act to the prejudice of another (b). Though the dignity of viscount was not created at the time when

(a) See Sir Edw. Coke's exposition of this statute, 2 Inst. 225.

(b) 2 Inst. 118; 10 Rep. 75, b.

this statute was made; yet it has been held, that such dignity is within the statute (*c*); and a peer of Scotland, since the union, may also take advantage of the statute (*d*). The form of declaration is, *tam pro domino rege quam pro seipso*, concluding *contra formam statuti* (*e*). The 2 Ric. II. c. 5, is a general law (*f*), and consequently need not be pleaded (*g*); but if the party undertook to recite it, and failed in a material part, it would have been fatal (*h*). It must appear on the face of the declaration, that the party injured was *unus magnatum* at the time when the words were spoken (*i*). Special bail was not required in this action (*j*), and the venue could not be changed upon the common affidavit (*k*). Neither could a writ of error be brought upon it in the Exchequer chamber; for it has been held, that this action is not an action on the case within the meaning of the 27 Eliz. c. 8, which gives the writ of error in the Exchequer chamber in certain actions (*l*). There is a dictum in 2 Show. 506, that in a *scand. mag.* the plaintiff obtaining a verdict will not be entitled to costs. It has been held, that certain words are actionable in the case of a peer, which would not have been deemed so in the case of a common person; as in *Lord Townshend v. Hughes*, where the defendant said of the plaintiff, "he is an unworthy man, and acts against law and reason" (*m*).

II. *Of the Action for Slander, and in what Cases it may be maintained* (*n*).

In former times, the action for slander was very rare; the first action for words to be found in the books was in the 30th year of Edw. III. Lib. Ass. fo. 177, pl. 19; and from that time to the reign of Queen Elizabeth, these actions were few in number, and not brought on frivolous causes; during the reigns of Queen Elizabeth and King James, they began to increase, and in modern times the action has been more frequent. Actions for words should not be brought upon slight and trivial occasions; and where the words

(*c*) *Visc. Say and Seale v. Stephens*, Cro. Car. 135.

(*d*) *Visc. Falkland v. Phipps*, Comyns' R. 439. Some of the old precedents state the plaintiff to have *vocem et locum in parlamento*. See Vid. Entr. 74; and Bohun, 319, 320: but these words are unnecessary, and they are omitted in two precedents in Herne, 200, 201. Vid. 61, 63.

(*e*) Vid. Entr. 74. An action upon a statute which prohibits a thing, but does not give any penalty, must be brought *tam pro rege quam pro seipso*, because in such case the king is to have a fine. *Waterhouse v. Barde*, Cro. Jac. 134. See the precedents cited in n. (*d*) *supra*.

(*f*) Doct. Plac. 339; 4 Rep. 13, a.

(*g*) *Lord Shaftesbury v. Lord Digby*, 2 Mod. 98.

(*h*) 4 Rep. 12, b.; for instances of misrecital, what fatal, and what not, see 1 Com. Dig. 188, (B.) 3.

(*i*) Adm. Cro. Jac. 136.

(*j*) 12 Mod. 420; 2 Mod. 215, S. P.

(*k*) *Duke of Norfolk v. Alderton*, Carth. 400; *Duke of Richmond v. Costelow*, 11 Mod. 234; 2 Salk. 668; 1 Lev. 56; 1 Bac. Abr. 36.

(*l*) *Lord Say and Seale v. Stephens*, Cro. Car. 142; Ley, 82, S. C.; Sir W. Jones, 194, S. C.

(*m*) 1 Mod. 232; 2 Mod. 150, S. C.

(*n*) The jurisdiction of the ecclesiastical courts in actions for defamation was abolished by 18 & 19 Vict. c. 41.

are merely words of heat, anger, or passion, spoken suddenly or without deliberation, such actions should be discountenanced; at the same time it has been truly said by *Wray*, C. J., that unless the party injured by false and malicious scandal had a remedy at law, it would be *à verbis ad verbera*, and the consequences might be fatal.

It would exceed the limits prescribed to this work to enumerate with particularity all the cases which have been adjudged as to what words are actionable and what are not so. It may be sufficient for the present purpose to observe, that an action on the case lies against any person for falsely and maliciously speaking and publishing of another, words which (a) charge him with any crime, for the commission of which the offender is punishable by common or statute law (p),—as treason (q), murder (r), larceny (s), perjury (t), keeping a bawdy-house (u), or with *having* any contagious disorder, the imputation of which may exclude him from society; as leprosy (x), plague, French pox (y), &c. But charging a person with *having had* a contagious disorder, is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the ground of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society (z). There are two sorts of malice: one denoting an act that has been done from ill-will towards an individual, or from some improper motive, and which is called express malice or malice in fact, and the existence of such ill will or improper motive must be proved; the other denoting a wrongful act that has been intentionally done, without just cause or excuse; and this is called malice, or malice in law, the law inferring that the natural consequences of the act were intended. In ordinary actions for slander, malice in law may be inferred from the publishing the slanderous matter, the act itself being wrong and intentional, and without just cause or excuse; but in actions for

(o) "The words must contain an express imputation of some crime, &c., and the charge upon the person spoken of must be precise." *Per de Grey*, C. J., in *Onslow v. Horne*, 3 Wils. 187. "Words to be actionable must be unequivocally so. Imputing to a person an evil inclination, which is not carried into effect, is not actionable." *Per Ellenborough*, C. J., in *Harrison v. Stratton*, 4 Esp. N. P. C. 218. So words implying mere suspicion. *Tozer v. Mashford*, 6 Ex. 539. The charging another with a crime of which he cannot by any possibility be guilty, as killing a person who is then living, has been held not to be actionable, because the plaintiff cannot be in any jeopardy from such a charge. *Snag v. Gee*, 4 Rep. 16, a.

(p) *Finch*, B. 3, C. 2. That is, by

common law or statute; for charging a man with an offence examinable only in the spiritual court, unless special damage ensues, is not actionable. *Parrat v. Carpenter*, Cro. Eliz. 502; *Graves v. Blanchet*, Salk. 696.

(q) *Lewis v. Roberts*, Hard. 203; Com. Dig. Action on the Case for Defamation (D), 1.

(r) 1 Roll. Abr. 72, pl. 4.

(s) *Aleyn*, 31.

(t) 1 Roll. Abr. 39, l. 25.

(u) 1 Roll. Abr. 44, l. 15.

(x) *Taylor v. Perkins*, Cro. Jac. 144.

(y) 1 Roll. Abr. 66, l. 38; *Bloodworth v. Gray*, 8 Scott's N. R. 9; 7 M. & G. 334.

(z) *Per Ashurst*, J., in *Carslake v. Mapledoram*, 2 T. R. 475; *Taylor v. Hall*, 2 Str. 1139, S. P.

slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved (a). Where the defendant, in the presence of a third person, not an officer of justice, charged the plaintiff with having stolen his property, and afterwards repeated the charge to another person, also not an officer of justice, who was called in to search the plaintiff with the consent of the latter; it was held, that the charge was privileged if the defendant believed in its truth, acted *bona fide*, and did not make the charge before more persons, or in stronger language than was necessary; and that it was a question for the jury and not the judge, whether the facts brought the case within this rule (b). The case appears, however, to have been overruled as to the last point (c). So in an action for slander, in giving a character of a servant, although the occasion *prima facie* justifies the communication of matter which would otherwise be actionable, yet, if at the close of the plaintiff's case there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them, but must leave it to them to say whether the defendant spoke the words under the influence of a sinister motive or not (d). A. having accused B. of stealing, a friend of the latter, to whom she had mentioned the fact called at A.'s shop and asked him if he had accused B. of stealing; to which A. answered, "Yes; and I believe it to be true." This was held not to be a privileged communication (e).

In order to sustain this action, it is essentially necessary that *the words should contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour*. An imputation of the mere defect or want of moral virtue, moral duties, or obligations, is not sufficient (f). To call a man a swindler is not actionable (g). So to say to a woman, "you are living by imposture; you used to walk St. Paul's Churchyard for a living," intending to impute that she was a swindler and prostitute (h). The Court of Exchequer, in a recent case, were equally divided as to whether it was actionable to call a man a "blackleg," two judges considering it would be so, if the persons who hear it understand it to impute an indictable offence (i). So to call a man a thief is not actionable, unless it be intended to impute felony to him. Hence, where that expression is accompanied

(a) *Bromage v. Prosser*, 4 B. & C. 247.

(b) *Padmore v. Lawrence*, 11 A. & E. 380; 3 P. & D. 209, recognizing *Toogood v. Spyrring*, 1 C. M. & R. 181; 4 Tyrw. 582. See *Kine v. Sewell*, 3 M. & W. 297; *Martin v. Strong*, 5 A. & E. 535. On the subject of privileged communications, see *post*, p. 1211, and *ante*, p. 986.

(c) *Somerville v. Hawkins*, 10 C. B. 533; *Taylor v. Hawkins*, 16 Q. B. 308; *Cooke v. Wildes*, 5 E. & B. 328.

(d) *Jackson v. Hopperton*, 16 C. B. (N. S.) 829.

(e) *Force v. Warren*, 15 C. B. (N. S.) 806.

(f) *Per de Grey*, C. J., delivering judgment in *Onslow v. Horne*, 3 Wils. 187, recognized by *Lawrence, J.*, in *Holt v. Scholefield*, 6 T. R. 695.

(g) *Savile v. Jardine*, 2 H. Bl. 531.

(h) *Wilby v. Elston*, 8 C. B. 142.

(i) *Barnett v. Allen*, 3 H. & N. 376; 1 F. & F. 125.

with other words, which clearly denote that the speaker did not intend to impute felony to the party charged, no action can be maintained. No action lies for these words :—" I will take him to Bow Street on a charge of forgery " (j). In an action for words, the words proved were,—“ He is a thief, for he has stolen my beer.” It appeared in evidence, that the defendant was a brewer, and that the plaintiff had lived with him as servant : in the course of which service he had sold beer to different customers of the defendant, and received money for the same, which he had not duly accounted for. Lord *Kenyon*, C. J., directed the jury to consider whether these words were spoken in reference to the money received, and unaccounted for by the plaintiff, or whether the defendant meant that the plaintiff had actually *stolen* beer ; for if they referred to the money not accounted for, that being a mere breach of contract, so far explained the word “ thief,” as to make it not actionable. As, if a man says to another, “ You are a thief, for you stole my tree,” it is not actionable (k), for it shows he had a trespass, and not a felony, in his contemplation. Verdict for defendant (l).

The rule which at one time prevailed, that words are to be understood *in mitiori sensu*, has been long ago superseded, and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them (m). And where the words are susceptible of a harmless and an injurious meaning, they may be pointed to the latter by innuendo (n). In an action for words, it was stated in the declaration that the plaintiff had lived among the neighbours with credit and reputation, and without being suspected of felony, and that the defendant, in order to charge him with the crime of felony, falsely and maliciously spoke of the plaintiff these false, malicious, and scandalous words, *viz.*, “ that the plaintiff was in Winchester gaol, and was tried for his life, and would have been hanged, if it had not been for Abraham Legat, for breaking farmer Atkin’s granary and stealing his sacks.” Plea, Not Guilty. After verdict for plaintiff ; it was moved, in arrest of judgment, that the words did not import any guilt in the plaintiff, being only a narrative of what passed on the trial, and rather tended to show the plaintiff was cleared by the evidence of Legat, than that he was guilty of any crime for which he deserved to be hanged. But *per* Lord *Hardwicke*, C. J., “ The construction now made upon actions for words is very different from what it was formerly. Judges, anciently, to discourage little frivolous actions, used their utmost endeavour to explain away the most opprobrious words ; but this was certainly wrong ; and as the character and reputation of mankind is under

(j) *Harrison v. King* (in error), 7 Taunt. 431 ; *post*, p. 1211.

(k) Cro. Jac. 114 ; Bull. N. P. 5.

(l) *Christie v. Cowell*, Peake, 4. See

also *Thompson v. Bernard*, 1 Campb. 48, to the same effect.

(m) *Roberts v. Camden*, 9 East, 96.

(n) *Griffiths v. Lewis*, 8 Q. B. 841.

the protection of the law, as well as their estates, we ought to do equal justice to both and take care that neither the one nor the other are injured. The question then is, whether the words spoken do import any slander or reproach, for which an action lies. To say a man has been in gaol and tried for his life, is certainly scandalous: and that he would have been hanged but for such a one, does naturally import, that he was saved by some indirect means. (And he cited the case of *Halley v. Stanton*, Cro. Car. 268, as a very strong authority in point.) As to the second question, whether the plaintiff ought not to have averred, that he was not in gaol, &c.? it was anciently held that such averments were necessary: but in later times, it has been held, that the alleging the words to have been spoken falsely, amounted to such an averment; and, if so, the court must now take it, that all the imputation cast on the plaintiff was false. If the words had been true, the defendant should have pleaded that specially (o). So where the defendant said of the plaintiff, that "he was under a charge of a prosecution for perjury, and that G. W., an attorney, had the attorney-general's directions to prosecute the plaintiff for perjury;" the defendant pleaded Not Guilty. After verdict for plaintiff; it was objected, in arrest of judgment, that the words were not actionable, as not conveying any opinion of the speaker upon the truth of the charge. But the court overruled the objection; Lord *Ellenborough*, C. J., (who delivered judgment), observing, that the words must mean, that the plaintiff was ordered by the attorney-general to be prosecuted, either for a perjury which he had committed, or which he had not committed, or which he was supposed only to have committed. In the first sense, they were clearly actionable. In the second, they could not possibly be understood consistently with the context. And if the defendant had used the words in the last sense, the jury might have acquitted him according to the doctrine in the case of *Oldham v. Peake*, both in the Court of Common Pleas (p), and in this court (q). And certainly, if the sense of the defendant, in speaking these words, had varied from that ascribed to them by the plaintiff, he might by specially pleading have shown them not actionable, had he not chosen to have rested the defence merely on the general issue. It appeared, therefore, that these words must fairly be understood in the first of these three senses; namely, that he was ordered to be prosecuted for a perjury, *which he had committed*: and so understood, they were unquestionably actionable (r). There are in the books various authorities to show, that the understanding of the hearers is the rule to go by. In a MS. case, 1 Viner, 507, it is laid down that the question is only what is understood by the hearers. In *Fleetwood v. Curly*, Hob. 268, Lord *Hobart* says, the slander

(o) *Carpenter v. Tarrant*, M. T., 10 Geo. II., B. R., MSS., Ca. Temp. Hardw. 339; cited by Lord *Ellenborough*, C. J., delivering the opinion of the court in

Roberts v. Camden, 9 East, 97.

(p) 2 Bl. 961, 962.

(q) Cowp. 278.

(r) *Roberts v. Camden*, 9 East, 93.

and damage consist in the apprehension of the hearers; and in Gilbert's Cases in Law and Equity, 117, the rule laid down is, that the words shall be taken in the sense in which the hearers understood them (*s*). This rule, however, has been somewhat modified by more recent cases, and it may be taken, that in action for words spoken or written, the ordinary sense of those words in which they may fairly be understood by bystanders not acquainted with the matter to which they relate (*t*) is to be taken as the meaning of the speaker or writer, unless something be shown to have taken place, which may give a peculiar character to the expressions used. And in the absence of such evidence, a witness cannot be asked what he understood by the words; the proper course is to lay the foundation by giving such evidence, and then the question becomes admissible (*u*).

In addition to the preceding instances, it may be observed, that it is actionable, falsely and maliciously to speak and publish of another, words which tend to disinherit him (*v*), or to deprive him of his estate (*x*), or which slander him in his office (*y*), profession (*z*), or trade (*a*); *e. g.* in speaking of a justice of the peace in the execution of his office, to say that "He is a rascal, a villain, and a liar," is actionable; for the words import a charge of acting corruptly and partially (*b*). Words imputing drunkenness to a certificated master mariner whilst in command of a vessel at sea, are actionable (*c*). Saying of a churchwarden, "He is a cheat, and cheated the parish of 4*l.*, and notwithstanding I have given him a receipt upon his bill of 9*l.* 1*s.* expended, it was a false thing, and I never received more than 5*l.* of the 9*l.* 1*s.*" (*d*). But words imputing to a churchwarden that he stole the parish bell-ropes are not actionable; the possession of the bell-ropes being in him (*e*). Words of an innkeeper, imputing insolvency, were held to be actionable; although, at the time they were spoken, an innkeeper was not subject to the bankrupt laws. For slander of this kind an action may be brought before any injury has been sustained, in consequence of the words having been spoken. From the nature of the words, the law implies the injury; hence such words are said to be actionable in themselves (*f*).

(*s*) See also *Read v. Ambridge*, 6 C. & P. 308.

(*t*) *Hankinson v. Bilby*, 16 M. & W. 442; 2 C. & K. 440.

(*u*) *Daines v. Hartley*, 3 Ex. 201. See also *The Duke of Brunswick v. Harmer*, 3 C. & K. 10.

(*v*) 1 Roll. Abr. 37, l. 27.

(*x*) *Bois v. Bois*, 1 Lev. 134.

(*y*) *How v. Prinn*, Salk. 694; Lord Raym. 812.

(*z*) *Hardwick v. Chandler*, Str. 1138.

(*a*) *Upsheer v. Betts*, Cro. Jac. 578, 579; *Jones v. Littler*, 7 M. & W. 423.

(*b*) *Aston v. Blagrove*, Str. 617; Lord Raym. 1369.

(*c*) *Irwin v. Brandwood*, 2 H. & C. 960.

(*d*) *Phillips v. Harrison*, C. B., Hil. Geo. II., on motion in arrest of judgment, Lord King's MSS., p. 44.

(*e*) *Jackson v. Adams*, 2 B. N. C. 402; 2 Sc. 599.

(*f*) *Whittington v. Gladwin*, 5 B. & C. 180. See *Brown v. Smith*, 13 C. B. 596; *Griffiths v. Lewis*, 7 Q. B. 61; *Robin v. Steward*, 14 C. B. 595; 23 L. J., C. P. 148; *Alfred v. Farlow*, 8 Q. B. 854.

To maintain an action for slander of title, there must be actual malice (*g*). Hence, where a person, thinking he had a right to recover possession of a term for some misconduct of his tenant, and hearing that the term was to be sold, went to the auction and said, the vendor could not make a title; it was held, that an action could not be maintained there being no proof of malice (*h*). So the attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title, if he, *bonâ fide*, though without authority, makes such objections to the seller's title, as his principal would have been authorized in making (*i*). In actions of this sort, the true question for the jury is, whether the words are false and malicious, and whether the special damage arose therefrom (*k*). Malice and special damage must be alleged and proved (*l*).

In *Harwood v. Sir J. Astley* (*m*), it was contended, that an action could not be maintained, because the words, which charged the plaintiff (below) with having murdered his father, were alleged to have been spoken of the plaintiff, (below), as a candidate to serve in parliament; but it was held, that the words being actionable in themselves, it is quite immaterial whether they were spoken of the plaintiff as candidate or not (*n*). If the plaintiff has sustained any special damage, in consequence of words actionable in themselves having been spoken, and seeks to recover a compensation for it, such special damage must be stated in the declaration, with as much certainty as the subject-matter is capable of in order that the defendant may be sufficiently apprised of the nature of the case which is intended to be proved against him, and consequently be prepared to meet it (*o*). Where the words charged the plaintiff, a horse-dealer, "with privately stealing certain horses sold by him," and consequently were actionable; after proving the words, the plaintiff's counsel applied to be admitted to give general evidence of loss of customers, but was denied (*p*). In a very recent case, however, it has been held, that in an action for slander of the plaintiff, in his business of an innkeeper, it is sufficient to allege and prove as special damage, a general loss of custom, without

(*g*) *Pitt v. Donovan*, 1 M. & S. 639; *Pater v. Baker*, 3 C. B. 855; *Hargrave v. Le Breton*, 4 Burr. 2422. See *Bignell v. Buzzard*, 3 H. & N. 217.

(*h*) *Smith v. Spooner*, 3 Taunt. 246.

(*i*) *Watson v. Reynolds*, M. & Malk. 1.

(*k*) *Brook v. Rawl*, 4 Ex. 521. See *Haddan v. Lott*, 15 C. B. 411; and *Eastwood v. Holmes*, 1 F. & F. 347.

(*l*) *Malachy v. Soper*, 3 B. N. C. 383.

(*m*) (In error,) 1 Bos. & Pul. N. R. 47.

(*n*) "Words are actionable when spoken of one in an office of profit, which may probably occasion the loss of

his office, or when spoken of persons touching their respective professions, trades and business, and do or may probably lead to their damage." *Per de Grey*, C. J., in *Onslow v. Horne*, 3 Wils. 186.

(*o*) *Geare v. Britton*, Bull. N. P. 7; *Hatheway v. Newman*, B. R. Middlesex Sittings, Feb. 17, 1804, *S. P.*, *per Lord Ellenborough*, C. J., 1 Wms. Saund. 243, d.

(*p*) *Waterhouse v. Gill*, coram Buller, J., Lancaster Lent Ass. 1790, Holroyd, MSS.; *Barnett v. Allen*, 1 F. & F. 125.

stating the names of the customers who have ceased to frequent the inn (q).

By 21 Jac. I. c. 16, s. 3, Actions on the case for *words* must be commenced and sued within two years next after the words were spoken. But by sect. 7, if any person shall be infant, feme covert, *non compos mentis*, person imprisoned or beyond sea at the time the cause of action accrued, then such person may sue within two years after the removal of his impediment.

Of words not actionable in themselves.—Where words imputing a punishable crime or misconduct in trade have been maliciously spoken, the law implies damage, and the words are said to be actionable *per se*; but when the words spoken, although they are of a defamatory nature, are not such that the law will imply damage, then words, although not actionable *per se*, may become so, by reason of some special damage arising from them, *e. g.* if a person say to a woman, “You are a whore,” whereby she loses her marriage (r), or a substantial benefit arising from the hospitality of friends (s). But calling a married woman or a single one a whore is not actionable without special damage, because fornication and adultery are subjects of spiritual not temporal censures, Lord Raym. 1004; except in the city of London, by reason of the custom there to cart whores, 1 Viner, S. 13. But there the words must charge that she was a whore in London; it is not sufficient if the declaration merely allege that she resided in London (t). Action for calling plaintiff’s wife a whore in London, suggesting the custom of London to cart whores, plaintiffs were nonsuited for want of proving the custom. Lord *Mansfield* said, he could not take notice of such custom, unless proved. No proof of it could be got from the town-clerk’s office; and it was then said that no proof of it had ever been given so as to maintain such actions out of the city courts, but that in the city courts they would take notice of their own custom (u). *Sed tempora mutantur*, and the custom having ceased to exist, it is to be feared that the purest virgin could no longer, even in a city court, maintain an action for being called a London whore, unless she could show material damage. The law as regards slanders on women is “unsatisfactory” and “barbarous;” and an imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable, without proof that it has actually produced special temporal damage to her, following as a natural consequence

(q) *Evans v. Harries*, 1 H. & N. 251. See also *Hartley v. Herring*, 8 T. R. 130; *Ashley v. Harrison*, 1 Esp. 48. As to particulars of persons who have ceased to deal and interrogatories, see *Wood v. Jones*, 1 F. & F. 301.

(r) 1 Roll. Abr. 35, l. 15.

(s) *Moore v. Meagher* 1 Taunt. 39, (in

error).

(t) *Robertson v. Powell*, B. R. Sittings at Serjeants’ Inn, before M. T. 57 Geo. III.

(u) *Stainton et Ux. v. Jones*, Sittings after Mich. Term, at Guildhall, coram Lord *Mansfield*, 1782, MS.

from the words (*x*). The loss of *consortium*, generally, would not be sufficient (*y*); it is doubtful whether even the loss of the *consortium* of a husband would be such a loss as would support the action. The loss of her maintenance by the husband may be the subject of a claim for damages, but such loss cannot be presumed to have arisen from the slander, but must be distinctly averred (*z*). In all these cases, where the words are not actionable *per se*, it is incumbent on the party injured, not only to state and prove the speaking of the words, but also the particular injury which he has sustained; because, the words not being actionable in themselves, the special damage is considered as the gist of the action (*a*). It must also appear that the special damage was the *legal* and natural consequence of the words spoken: and it has been held that an illegal consequence, *viz.*, a tortious act, will not be sufficient (*b*): some doubt, however, has been thrown on this latter point (*c*). In slander for words uttered of the plaintiff to her employer, who stated that she dismissed the plaintiff from her service, not because she believed the words, but because she was afraid she should offend her landlord by keeping her; it was held, the special damage being the consequence of the words used, the action was maintainable; the court could not speculate on the motives of witnesses. And *per Patteson, J.*, it is not like *Vicars v. Wilcocks*, because here the whole cause of the special damage proceeds from the defendant himself; nothing is done by any other person (*d*).

Two persons cannot join in an action for slanderous words spoken of them, for the injury which the one sustains by the slander is not an injury done to the other (*e*). But if defamatory words be spoken of partners in trade *whereby they are injured in their trade*, a joint action will lie at the suit of the partners, although the words be actionable of themselves (*f*).

In *Lord Northampton's* case (*g*) it was resolved (*inter alia*) "that in an action for the slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief, J. S. may, if the truth be so, justify in an action on the case brought against him. But if he publish that he hath heard generally, without naming a certain author, that J. G. was a traitor or thief he cannot justify, because he has not given to the party

(*x*) *Per* Lord Chancellor *Campbell*, *Lynch v. Knight*, 9 H. L. Cas. 577.

(*y*) *Roberts v. Roberts*, 5 B. & S. 384.

(*z*) *Lynch v. Knight*, 9 H. L. Cas. 577; *Allsop v. Allsop*, 5 H. & N. 534.

(*a*) *Broune v. Gibbons*, Salk. 206.

(*b*) *Vicars v. Wilcocks*, 8 East, 1; 2 Smith's Lead. Cas. See *Kelly v. Partington*, 5 B. & Ad. 645; 3 Nev. & M. 117.

(*c*) See 1 Wms. Saund. 243, f.; Stark. on Libel, 205 (2nd edit.); *per Parke, B.*,

in *Green v. Bulton*, 2 C. M. & R. 715; *Coppin v. Braithwaite*, 8 Jur. 875; 2 Smith's Lead. Cas.

(*d*) *Knight v. Gibbs*, 1 A. & E. 43; 3 Nev. & M. 467; and see *Tunnickiffe v. Moss*, 3 C. & K. 83; *Kendillon v. Mallby*, Car. & M. 402.

(*e*) *Dyer*, 19, a, pl. 112.

(*f*) *Cook and another v. Batchellor*, 3 B. & P. 150. See *ante*, p. 989.

(*g*) 12 Coke's Rep. 133.

grieved any cause of action against any other but himself." This statement of the law was approved of by L. C. J. *Kenyon* and others (*h*), with the qualification that the disclosure of the name of the person who made the statement must be made at the time of repeating it. In *Lewis v. Walter*, 4 B. & Ald. 614, however, *Holroyd, J.*, remarks—"in reference to the first of the above resolutions it is questionable whether as stated it must not have some qualification added . . . Taking, therefore, the whole together it seems to me that the proper way is to take the passage with this qualification that if J. S. publish, *on a fair and justifiable occasion*, that he hath heard J. W. say that J. G. was a traitor or thief, he may, if the truth be such, justify." In an action (*i*) for words spoken of the plaintiff in his trade, importing a direct assertion made by the defendant, that the plaintiff was insolvent; the defendant pleaded that one T. W. spoke and published to the defendant the same words, and that the defendant, at the time of speaking and publishing them, declared that he had heard and been told the same from and by the said T. W.; it was held, upon demurrer, that the plea was bad for three reasons, the last of which was, because it is no answer to an action for oral slander, for a defendant merely to show that he heard it from another, and named the person at the time, without showing also that he believed it to be true, and that he spoke the words on a justifiable occasion. Where slanderous words are not actionable *per se*, no action will lie against the original utterer of the slander, for damage resulting from a repetition of it unauthorized by him (*j*).

A coroner holding an inquest on a dead body is not liable to an action for words falsely and maliciously spoken by him in his address to the jury (*k*). And it would seem that it may be laid down generally that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice (*l*).

From the preceding remarks, it appears that falsehood and malice, either express or implied, are of the essence of the action for slander, and special damage, where the words are not actionable in themselves. Where words, falsely and maliciously spoken, are actionable in themselves, the law *prima facie* presumes a consequent damage without proof.

(*h*) *Davis v. Lewis*, 7 T. R. 17; *Maitland v. Goldney*, 2 East, 426. These cases were recognized in *Woolnoth v. Meadows*, 5 East, 463.

(*i*) *M'Pherson v. Daniels*, 10 B. & C. 271; 5 M. & R. 251. See also *Ward v. Weeks*, 7 Bingh. 211; *Bennett v. Bennett*, 6 C. & P. 588, *Alderson, B.*; and the remarks of *Best, C. J.*, in *De Crespigny*

v. Wellesley, 5 Bingh. 401; *Tidman v. Ainslie*, 10 Ex. 63; and 1 Wms. Saund. 244, b.

(*j*) *Parkins v. Scott*, 1 H. & C. 153.

(*k*) *Thomas v. Churton*, 2 B. & S. 475; 31 L. J., Q. B. 139.

(*l*) *Scott v. Stansfield*, and other authorities there cited, L. R. 3 Ex. 222; 37 L. J. Ex. 155.

III. *Of the Declaration, and herein of the Nature and Office of the Innuendo.*

The Common Law Procedure Act, 1852, gives a concise form of declaration in actions of slander (*m*), and enacts, that in such actions, as well as in actions of libel, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient (*n*). In the declaration, it must be alleged expressly what words were spoken, and that they were spoken and *published* of the plaintiff (*o*) falsely and maliciously; thus, an allegation "that the defendant spake of the plaintiff, quædam falsa et scandalosa verba, *quorum tenor sequitur in hæc verba*," &c., was held insufficient, because it was not an express allegation, that the defendant spake the same identical words (*p*). This rule, that the words spoken should be set forth precisely, is not confined to those cases only in which the action is, properly speaking, for slander, but extends also to cases where special damage is the ground of the action. If the words were spoken in a foreign language, it must be averred in the declaration that the hearers understood such language (*q*). Where the charge alleged against the plaintiff relates to his office, profession or trade, there it ought to appear on the face of the declaration, that plaintiff was in office (*r*), or exercising his profession or trade (*s*) at the time when the words were spoken, and that they were spoken in relation to his office, profession, or trade (*t*). In an action for slander, imputing adultery to plaintiff, a physician, where no special damage was laid; it was held not sufficient, before the Common Law Procedure Act, to state the words to have been spoken of him "in his profession;" but that it ought to have been set forth in the declaration in what manner the scandalous conduct was connected by the speaker with that profession (*u*). In such cases, if the declaration failed to show how the imputation was connected by the speaker with the plaintiff's office or profession, it would have been bad after verdict (*x*).

(*m*) 15 & 16 Vict. c. 76, s. 91, and Sched. B. No. 32.

(*n*) 15 & 16 Vict. c. 76, s. 61.

(*o*) *Johnson v. Aylmer*, Cro. Jac. 126.

(*p*) *Garford v. Clerk*, Cro. Eliz. 857. *Gutsole v. Mathers*, 1 M. & W. 495, recognizing *Cook v. Cox*, 3 M. & S. 110; and *post*, p. 1211.

(*q*) *Price v. Jenkins*, Cro. Eliz. 865; 1 Wms. Saund. 242, note (1).

(*r*) Yelv. 158; *Bellamy v. Birch*, 16 M. & W. 590.

(*s*) *Collis v. Malin*, Cro. Car. 282.

(*t*) *Todd v. Hastings*, 2 Wms. Saund. 307; *Savage v. Robery*, Salk. 694.

(*u*) *Ayre v. Craven*, 2 A. & E. 2; 4 Nev. & M. 220; *Wilby v. Elston*, 8 C. B. 142; *Doyley v. Roberts*, 3 B. N. C. 840; *Jones v. Littler*, 7 M. & W. 423. See *Hopwood v. Thorn*, 8 C. B. 293; *Southey v. Denny*, 1 Ex. 199; *Pemberton v. Coles*, 10 Q. B. 461; *Edsall v. Russell*, 4 M. & G. 1090; 5 Scott, N. R. 801.

(*x*) *James v. Brook*, 9 Q. B. 7.

But it would be sufficient to aver that it was the duty of the plaintiff in his employment not to do that which the words complained of charged him with doing (y).

In an action of slander, imputing incontinence to a clergyman, the declaration must show that he is beneficed, or holds some clerical office or employment of temporal profit (z). Where such action is by one, who has been a preacher at a dissenting meeting-house, but who, by reason of the slander, has been dismissed from his employment, it is not necessary to state that he was legally in the exercise of the employment, nor is it necessary to state the names of the persons who dismissed him; but it is sufficient to say, that the persons who frequented the chapel refused to permit him to preach, by reason whereof he had lost the emoluments he would otherwise have acquired (a). In an action for words spoken of a person who was a candidate to serve in parliament, it is not necessary to set forth the writ in the declaration. It is sufficient for the plaintiff to state that he was a candidate to serve in the (present) parliament, which cannot exist without a writ to call the parliament together (b).

The difficulties involved in the right use of the *colloquium* and *innuendo* have been removed by the Common Law Procedure Act, 1852 (c). Before that enactment, when the innuendo was annexed to the charge preferred against the plaintiff, its office was to give the words spoken their proper signification, but not to extend the sense of them beyond their natural import. Thus, that the plaintiff was the person intended, must have appeared from the manner in which the words were spoken, which must have been stated in the declaration; namely, that they were spoken of the plaintiff, or to the plaintiff, or in a conversation with the plaintiff, and not from the *innuendo* only (d); for if the person of whom the words were spoken be uncertain no action will lie; and the plaintiff could not merely, by the force of an innuendo, apply the words to himself (e). Therefore, where a declaration stated that defendant said of the plaintiff, "He has forsworn himself, (*meaning* that the plaintiff had committed wilful and corrupt perjury;)" it was held, that the words not being actionable in themselves, because they did not necessarily imply that the plaintiff had forsworn himself *in a judicial proceeding*, their meaning could not be extended by the innuendo (f). But if the defendant had spoken the words concerning some judicial proceeding that had before taken place,

(y) *Foulger v. Newcomb*, L. R. 2, Ex. 332.

(z) *Gallwey v. Marshall*, 9 Ex. 295.

(a) *Hartley v. Herring*, 8 T. R. 130.

See *Evans v. Harries*, 1 H. & N. 251.

(b) *Harwood v. Sir J. Astley*, 1 N. R. 47, (on error).

(c) Sect. 61 and Sched. B., *ante*, p. 1207.

(d) 4 Rep. 17, b.; 3 Bulst. 227.

(e) *Johnson v. Aylmer*, Cro. Jac. 126. See *Le Fanu v. Malcomson*, 1 H. L. Cas. 637; *Turner v. Merewether*, 7 C. B. 251; (*in error*), 19 L. J., C. P. 10; *Wakley v. Healey*, 7 C. B. 591; *Solomon v. Lawson*, 8 Q. B. 823.

(f) *Holt v. Scholefield*, 6 T. R. 691. See also *Core v. Morton*, Yelv. 28.

in which the plaintiff had given testimony, and these facts had been averred in the declaration, then such an innuendo would have been good; because the words, coupled with the preceding facts, would have shown, that the defendant meant to charge the plaintiff with perjury punishable by law. So, where the slander was, "He has burnt my barn," the plaintiff could not say, by way of innuendo, "my barn *full of corn*;" because that is not an explanation of the words, but an addition to them. But if, in the introductory part of the declaration, it had been averred, *that the defendant had a barn full of corn*, and also, *that in a discourse about that barn*, the defendant had spoken the words, an innuendo, that he meant by those words the barn full of corn, would have been good (*g*). This distinction was recognized in a later case: it was stated in the declaration, that the plaintiff had, in due manner, put in his answer upon oath to a bill filed against him in the Court of Exchequer by the defendant, (but it was not averred that the words were spoken in a discourse about that answer;) it was then alleged, that defendant said of the plaintiff that he had forsworn himself (*meaning that the plaintiff had perjured himself in his aforesaid answer to the bill so filed against him*;) it was held, on motion in arrest of judgment after verdict, that the declaration was bad, for want of an averment of *colloquium* respecting the answer in the Exchequer, which was not supplied by the innuendo; and further, that the defect was not cured by verdict (*h*). In all cases, therefore, where the words could be understood in an actionable sense only by reference to certain facts, such facts must have been distinctly stated in the body of the declaration: for the mere introduction of those facts, under an innuendo, would not have been deemed a sufficient averment of them (*i*): that which comes after the innuendo not being issuable (*k*): and further, it must have been averred, that the words were spoken in a conversation about those facts. In short, the words must have been sufficient to maintain the action without the innuendo (*l*). And the meaning given by the innuendo must have been such as might fairly be collected, either from the words alone, or from the words coupled with facts, which were the subject of the conversation, previously averred in the declaration; for an innuendo could not have been used to enlarge the meaning of words without prefatory averments (*m*). It is to be observed, however, that although new matter could not be introduced by an innuendo (*n*), but must have been brought

(*g*) *Per de Grey*, C. J., in *R. v. Horne*, Cowp. 684.

(*h*) *Hawkes v. Hawkey*, 8 East, 427, recognized by *Bayley*, J., in *Goldstein v. Foss*, 6 B. & C. 160, and by *Tindal*, C. J., delivering judgment in *Alexander v. Angle* (*on error*), 1 Cr. & J. 146; and see *Hearne v. Stowell*, 12 A. & E. 719; 4 P. & D. 696.

(*i*) 1 Roll. Abr. 88, l. 10.

(*k*) *Slocumb's case*, Cro. Car. 443.

(*l*) *Lovet v. Hawthorn*, Cro. Eliz. 834.

(*m*) *Per Patteson*, J., *Gompertz v. Levy*, 9 A. & E. 285, citing *Goldstein v. Foss*, 6 B. & C. 160.

(*n*) *Day v. Robinson* (*in error*), 1 A. & E. 554; 4 Nev. & M. 884. See *Griffith v. Lewis*, 8 Q. B. 841; and *Wakley v. Healey*, 7 C. B. 591.

upon the record in another way, yet where such new matter was not necessary to support the action, an innuendo, without any *colloquium*, might be rejected as surplusage (o).

Since the Common Law Procedure Act, 1852, the declaration must set forth words actionable either *per se* or on account of the particular meaning attributed to them in the declaration (p). And where the words have no ordinary meaning at all, their acquired meaning cannot in the absence of an *innuendo*, be gone into, as where the words were "You are a *bunter*" (q). But the pleader may put any construction upon the words he may choose, and may leave it to the jury to say whether such construction is borne out by the evidence (r). An action will not lie for these words, "I will take him to Bow Street, on a charge of forgery," without an innuendo (s). In a declaration for slander of plaintiff in his trade, a count, alleging that the defendant, in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged and asserted and accused plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, is ill; and if it be joined with other counts, which set out the words, and a general verdict given, the court will arrest the judgment (t). It is the province of the jury to decide whether the defendant's meaning was such as is imputed to him by the innuendo (u). In an action for calling the plaintiff a thief, it was proved that the defendant said of the plaintiff, "Why don't you come out, you blackguard, rascal, scoundrel. Penfold, you are a thief;" but the witness who proved the words was not asked whether, by the word "thief," he understood that the defendant meant to charge the plaintiff with felony (x). *Chambre, J.*, in his direction to the jury, said, that it lay on the defendant to show that felony was not imputed by the word "thief;" and a verdict was found for the plaintiff. On a motion to set aside the verdict, on the ground that it appeared, from the expressions which accompanied the word "thief," that the defendant did not intend to impute felony, but merely used that word, together with the others, in the heat of passion; that no evidence was given to show that the word "thief" was understood by those who heard it to charge the plaintiff with any crime, the court refused the application; *Sir J. Mansfield, C. J.*, observing, that the jury ought not to have found a verdict for the plaintiff unless they understood the defendant to impute theft to

(o) *Roberts v. Camden*, 9 East, 95; *Barrett v. Long*, 3 H. L. Cas. 395.

(p) 15 & 16 Vict. c. 76, s. 61. See *Galway v. Marshall*, 9 Ex. 294; *Horner v. Taunton*, 5 H. & N. 661.

(q) *Rawlings v. Norbury*, 1 F. & F. 341.

(r) *Hemmings v. Gasson*, 27 L. J., Q. B. 255, and 1 E. B. & E. 346, *ante*, p. 991.

(s) *Harrison v. King (in error)*, 7 Taunt. 431.

(t) *Cook v. Cox*, 3 M. & S. 110. See *ante*, p. 1208.

(u) 15 & 16 Vict. c. 76, s. 61; *per Gould and Blackstone, JJ.*, 2 Bl. R. 961, 962, cited by *Ellenborough, C. J.*, in *Roberts v. Camden*, 6 East, 95.

(x) See *ante*, p. 1203.

the plaintiff. The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word; and if the jury had thought that the word was only used by the defendant as a word of general abuse, they ought to have found a verdict for the defendant. Supposing that the general words which accompany the word "thief" might have warranted the jury in finding for the defendant, yet, as they have not done so, the court cannot say that the word did not impute theft to the plaintiff (z). A count, charging that defendant had imposed upon the plaintiff the crime of felony, is good after verdict (a). Where the words were, "You have committed a crime for which I can transport you," they were held (on motion in arrest of judgment), to be actionable without any *colloquium* or innuendo (b).

IV. *Of the Pleas.*

Evidence, p. 1214.

Costs, p. 1216.

Of the Pleas.

Money cannot be paid into court (c). The general issue in this action is, Not Guilty, which operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial is admissible under that plea: all other pleas in denial must take issue on some particular matter of fact alleged in the declaration (d). In an action of slander of the plaintiff in his office, profession, or trade, the plea of Not Guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged (e). On the general issue, the defendant will not be allowed to give the truth of the fact imputed to the plaintiff in evidence even in mitigation of damages: and this rule holds in all cases, whether the words do or do not import a charge of felony (f), or whether a charge of felony be particular (g) or general (h). If, however, the charge be true, the defendant may *plead* it in justification. But if the de-

(z) *Penfold v. Westcote*, 2 N. R. 335.

See *Rowcliffe v. Edmunds*, 7 M. & W. 12.

(a) *Blizard v. Kelly*, 2 B. & C. 283.

(b) *Curtis v. Curtis*, 10 Bingh. 477; 4 M. & Sc. 337. See *Francis v. Roose*, 3 M. & W. 191; *Tozer v. Mashford*, 6 Ex. 539.

(c) 15 & 16 Vict. c. 76, s. 70.

(d) R. G., H. T. 1853.

(e) *Ibid.*

(f) *Underwood v. Parkes*, Str. 1200. S. P., per Lord Mansfield, C. J., Middlesex Sittings, 1767, MS., *Chambre*, J.

(g) *Smith v. Richardson*, Willes, 20, per eight judges.

(h) Per twelve judges, S. C. See *Rumsey v. Webb*, Car. & M. 104.

fendant puts a plea of justification on the record, and offers no evidence in support of it, this conduct may not only enhance the damages against him, but also afford evidence of express malice (*i*). If the words were spoken by the defendant as counsel, and were pertinent to the matter in issue (*k*), or in confidence, as by a master, upon being applied to for the character of a servant (*l*): in these and similar cases an action will not lie, because malice (one of the essential grounds in an action for slander) is wanting (*m*); but, "if without ground, and purely to defame, a false character should be given, it would be proper ground for an action" (*n*). The defence of privileged communication is admissible under the general issue (*o*); but if the defendant takes upon himself to plead it specially, the plea must allege that the defendant made the communication on a lawful occasion, believing it to be true and without malice, or at least *bond fide* (*p*). Where a person intending to hire a servant applies to the former master for a character, the master (except where express malice is proved) shall not be obliged to prove the truth of the character he gives; for in such case the disclosure is not made officiously, but in confidence, and the facts may happen to rest only in the knowledge of master and servant. But where the master voluntarily, and without being applied to, speaks defamatory words of his servant, it will be incumbent on him to plead and prove the truth of the words (*q*). "I take the law to be well settled, that, where a master is applied to for a character of a servant, the former is not called upon in an action to prove the truth of any aspersions thrown out by him against the latter, but that it lies upon the servant to prove the falsehood of such aspersions. In such case the master is justified, unless the servant prove express malice" (*r*). *Note*.—A servant cannot bring an action against his master for not giving him a character (*s*).

The general issue puts in issue the special damage alleged, whether the words are or are not actionable *per se*; and a plea

(*i*) *Simpson v. Robinson*, 12 Q. B. 511; *Wilson v. Robinson*, 7 Q. B. 68.

(*k*) *Hodgson v. Scarlett*, Holt's N. P. C. 621; 1 B. & A. 232. See 9 M. & W. 358, and 18 C. B. 141.

(*l*) *Edmondson v. Stephenson and another*, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110. See also *Hargrave v. Le Breton*, 4 Burr. 2425.

(*m*) *Warr v. Jolly*, 6 C. & P. 497; *Woodward v. Lander*, 6 C. & P. 548.

(*n*) *Per* Lord Mansfield, C. J., in *Edmondson v. Stephenson*, Bull. N. P. 8, cited by Parke, J., in *Blackburn v. Blackburn*, 4 Bingh. 408. As to privileged communications, see *ante*, p. 986.

(*o*) *Lillie v. Price*, 5 A. & E. 645; *Hoare v. Silverlock*, 9 C. B. 20; *Lord Lucan v. Smith*, 1 H. & N. 481; 26 L.

J., Ex. 94.

(*p*) *Smith v. Thomas*, 2 B. N. C. 372; 2 Scott, 546.

(*q*) Said by Lord Mansfield, C. J., to be so settled, and that he had often ruled it so at Nisi Prius. *Lawry v. Ackenhead and Ux.*, B. R. Sittings, M. 8 Geo. III., Chambre, MSS.; *Kelly v. Partington*, 4 B. & Ad. 700; 2 Nev. & M. 460. See however *Pattison v. Jones*, 8 B. & C. 578, and *ante*, p. 988.

(*r*) *Per* Chambre, J., in *Rogers v. Clifton*, 3 B. & P. 594. The case itself is well worthy of attention on this subject, but the circumstances of it are too special for insertion in this work. See also *Simpson v. Robinson*, 12 Q. B. 511.

(*s*) *Per* Lord Kenyon, C. J., in *Carrol v. Bird*, 3 Esp. 201.

negating the special damage in slander for words actionable in themselves has been held bad on demurrer (*t*). To an action by husband and wife for slander of the wife, a plea that the female plaintiff was not the wife of the other plaintiff is a good plea in bar (*u*).

The defendant may plead that the words were not spoken within two years before the commencement of the action (*x*).

Evidence.

By 6 & 7 Vict. c. 96, s. 1, in any action for defamation, it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

The words must be proved as laid in the declaration (*y*); that is, such of them as will support the action; for it is not necessary for the plaintiff to prove *all* the words stated in the declaration; only what is material (*z*). Formerly, indeed, it was held that the plaintiff must prove all the words precisely as laid; but now it is otherwise (*a*). The extensive powers of amendment contained in the Common Law Procedure Act, 1852 (*b*), render it unnecessary to state at large the cases which illustrate the above rule (*c*). Where the declaration alleged that the plaintiff was of two trades, although the plaintiff failed to prove that he was of both; it was held, that he might recover upon proof that he was of that trade concerning which the defendant was charged to have spoken the words; for the allegation was partible (*d*). The plaintiff, after proving the words as laid in the declaration, may prove that the defendant spoke other words on the same subject or referring to it, either before or afterwards, although such words may be actionable; for this evidence is admissible, not in aggravation of damages, but for

(*t*) *Smith v. Thomas*, 2 B. N. C. 372; *Wilby v. Elston*, 8 C. B. 142.

(*u*) *Chandler v. Lindsey*, 16 M. & W. 82; 4 D. & L. 339.

(*x*) 21 Jac. I. c. 16, s. 3.

(*y*) *Barnes v. Holloway*, 8 T. R. 150. *Per Lawrence, J.*, in *Maitland v. Goldney*, 2 East, 438; *Walters v. Mace*, 2 B. & A. 756; *Hancock v. Winter*, 7 Taunt. 205.

(*z*) *Per Bayley, B.*, *Cox v. Thomason*, 2 Cr. & J. 364; *Compagnon v. Martin*, Bl. R. 790.

(*a*) Bull. N. P. 5, cites 2 Roll. Abr. 718.

(*b*) Sect. 222. See *Saunders v. Bate*, 1 H. & N. 402, *ante*, p. 991. See also the following cases on the former enact-

ments, viz., *Prudhomme v. Fraser*, 1 Moo. & R. 435; *Smith v. Knowelden*, 2 M. & G. 561; 2 Scott, N. R. 657; *Southee v. Denny*, 1 Ex. 196; *Camfield v. Bird*, 3 C. & K. 56; *Pater v. Baker*, 3 C. B. 831; *Wilkin v. Reed*, 15 C. B. 192.

(*c*) See *Stannard v. Harper*, 5 M. & R. 295; *Avarillo v. Rogers*, London Sittings, Trin. 1773, B. R.; *R. v. Berry*, 4 T. R. 217; *Nelson v. Dixie*, Ca. Temp. Hardw. 306; *Solomons v. Medex*, 1 Stark. N. P. C. 191; *Barnes v. Holloway*, 8 T. R. 150.

(*d*) *Figgins v. Cogswell*, 3 M. & S. 369.

the purpose of proving the malice of the defendant in deliberately speaking the words which are the subject of the action (*e*).

In an action for words of perjury, the plaintiff offered in evidence a bill of indictment, which had been preferred against him by the defendant, and which the grand jury returned ignoramus. This was held to be admissible evidence to show the malicious intent with which the words were spoken (*f*). Express malice need not be proved; if the charge be false, malice will be implied. The existence of express malice is only a matter of inquiry, where the injurious expressions, which are the subject of complaint, are uttered upon a lawful occasion (*g*). In an action for slander of title, it must appear that the words were spoken maliciously: it is not necessary for the defendant to plead specially; but the plaintiff must prove malice, which is the gist of the action (*h*). Where in the declaration it was alleged, that the plaintiff was a physician, and exercised that profession in England, and on that account was called doctor, meaning doctor of medicine, and that defendant slandered plaintiff in his character of a physician, and denied his right to be called a doctor of medicine; it was held that the plaintiff must prove that he was entitled to practise as a physician in England: it was not sufficient to show that he had in fact so practised; nor that he had received the degree of doctor of medicine at the University of St. Andrew's in Scotland (*i*). It is not competent for the defendant, under the general issue, to offer, in mitigation of damages, evidence that the specific facts in which the slander consists, and for which the action is brought, were communicated to him by a third person (*k*). In an action for words imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also pleas of justification, evidence of general good character is not admissible for the plaintiff (*l*). Where words are given in evidence in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words; as, not being on the record, the defendant has had no opportunity of justifying them (*m*). Where the words are not actionable in themselves, and the only ground of action is the special damage, such special damage must be proved as alleged (*n*). Where the words are actionable without the inducement, the insertion of what is not material and not proved, does not occasion a variance of which advantage can be taken (*o*).

(*e*) See 2 Phillpotts, c. 9, and *ante*, tit. "Libel," p. 996; but see *Defries v. Davies*, 7 C. & P. 112, *Tindal*, C. J.

(*f*) *Tate v. Humphrey*, 2 Campb. 73, n. See also *Rustell v. M'Quister*, *ante*.

(*g*) *Per Tindal*, C. J., *Hooper v. Truscott*, 2 B. N. C. 464. See *ante*, p. 996, and *Padmore v. Lawrence*, 11 A. & E. 380, and the other cases cited, *ante*, p. 1200.

(*h*) *Smith v. Spooner*, 3 Taunt. 246, *ante*, p. 380.

(*i*) *Collins v. Carnegie*, 1 A. & E. 695; 3 Nev. & M. 703.

(*k*) *Mills v. Spencer*, Holt's N. P. C. 533. *Sed quære*, see p. 997.

(*l*) *Cornwall v. Richardson*, Ry. & M. 305, *Abbott*, C. J.

(*m*) *Warne v. Chadwell*, 2 Stark. N. P. C. 457.

(*n*) *Ward v. Weeks*, 7 Bingh. 211.

(*o*) *Cox v. Thomason*, 2 Cr. & J. 361; 2 Tyrw. 411.

The court refused to grant a new trial on the ground that the damages were excessive, where the jury had given 750*l.* in an action for defamatory words spoken of a beneficed clergyman to his curate (*p*). And a new trial is never granted on the ground that the damages are insufficient, unless there has been a mistake in law, or a mistake in the calculation of figures, or misconduct on the part of the jury (*q*).

Where one of several counts in a declaration for slander is bad, and some of the defamatory words in it are proved, and the jury find a verdict generally with damages for the plaintiff, the court will award a *venire de novo* (*r*). But where the matter alleged in the declaration constitutes one count only and general damages are found, judgment will not be arrested on the ground of some of the matter charged not being actionable (*s*).

Costs.

By 21 Jac. I. c. 16, s. 6, "In all actions upon the case for slanderous words, if the jury upon the trial of the issue, or the jury *that shall inquire of the damages*, assess the damages *under forty shillings*, then the plaintiff shall recover only so much costs as the damages so assessed amount to." This statute does not extend to actions founded on special damage only, because, properly speaking, they are not actions for *words*, but for the special damage (*t*). But where words are actionable in themselves, and special damage is laid in the declaration only by way of aggravation, although the special damage be proved, yet if the damages recovered are under 40*s.*, there shall be no more costs than damages (*u*). In *Baker v. Hearne* (*x*), B. R., H. 1767, argued by Dunning for plaintiff, and Ashhurst for defendant, the distinction was not controverted by plaintiff's counsel; the court being of opinion that the words were actionable as relating to plaintiff in his way of trade, they allowed no more costs than damages, the damages being under 40*s.*, notwithstanding the special damages laid in the declaration. If some of the counts in the declaration be for words that are actionable, and others for words not actionable, and special damage be laid referring to all the counts, and there be a general verdict for plaintiff, he is entitled to full costs, though he recover less than 40*s.* damages (*y*). In a case where the declaration embraced two distinct objects, *viz.*, a charge for speaking words actionable in them-

(*p*) *Highmore v. Lord and Lady Harrington*, 3 C. B., N. S. 142.

(*q*) *Forsdike v. Stone*, 3 L. R., C. P. 607.

(*r*) *Empson v. Griffin*, 11 A. & E. 186, recognizing *Angle v. Alexander*, 7 Bingh. 119; and *Day v. Robinson*, 1 A. & E. 554. See *Solomon v. Lawson*, 8 Q. B. 823; *Pemberton v. Colls*, 10 Q. B. 461.

(*s*) *Alfred v. Farlow*, 8 Q. B. 854.

(*t*) *Lowe v. Harewood*, Sir William

Jones, 196; *Collier v. Gaillard*, 2 Bl. Rep. 1062; *Goddall v. Ensell*, 2 C. M. & R. 249; *Grenfell v. Pierson*, 1 Dowl. 406; *Kelly v. Partington*, 5 B. & Ad. 645.

(*u*) Lord Raym. 1588; *Burry v. Perry*, 2 Str. 936; *Turner v. Horton*, Willes, 438.

(*x*) MSS., *Chambre*, J.

(*y*) *Savile v. Jardine*, 2 H. Bl. 531.

selves, and a charge that defendant procured plaintiff to be indicted, without probable cause, for felony; it was held, that such an action, not being merely an action for words, but also an action on the case for a malicious prosecution, was not within the statute; and, therefore, although plaintiff recovered damages under 40s., yet he should be entitled to full costs (z). In cases within the statute, if damages are under 40s., plaintiff cannot have more costs taxed than the damages, *notwithstanding defendant has justified* (a). By 58 Geo. III. c. 30, s. 2, in actions or suits for slanderous words, in courts not holding plea to the amount of 40s., if the jury assess the damages under 30s., the plaintiff shall recover costs only to the amount of the damages.

(z) *Topsall v. Edwards*, Cro. Car. 163; *Blizard v. Barnes*, Cro. Car. 307.

(a) *Halford v. Smith*, 4 East, 567, S.

P. said, *per Clive, J.*, in *Bartlett v. Robbins*, to have been determined in the Court of B. R., 2 Wils. 258, E. 5 Geo. I.

CHAPTER XXXVII.

STOPPAGE IN TRANSITU.

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Nature of the Right of Stopping in Transitu.—When goods are consigned upon credit by one merchant to another, it frequently happens that the consignee becomes a bankrupt or insolvent, before the goods are delivered. In such case the law, deeming it unreasonable that the goods of one person should be applied to the payment of the debts of another, permits the consignor to resume the possession of his goods. This right which the consignor has of resuming the possession of his goods, if the full price has not been paid, in the event of the insolvency of the consignee, is technically termed the right of stopping in transitu. The doctrine of stoppage in transitu owes its origin to courts of equity (a), but it has since been adopted and established by a variety of decisions in courts of law, and is now regarded with favour as a right which those courts are always disposed to assist. This right is paramount to any lien against the purchaser (b).

The following cases will illustrate the nature of this right. B., at London, gave an order to A., at Liverpool, to send him a quantity of goods. A. accordingly shipped the goods on board a ship there, whereof the defendant was master, who signed a bill of lading to deliver them in good condition to B. in London. The ship arrived in the Thames, but B. having become a bankrupt, the defendant was ordered, on behalf of A., not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared, by the plaintiff's witnesses, that no particular ship was mentioned, whereby the goods should be sent, in which case the shipper is to be at the risk of the perils of the seas. An action on the case,

(a) See *D'Aquila v. Lambert*, 9th June, 1761; 2 Eden, 75, and Amb. 399, where the doctrine was first recognized;

and *per Lord Abinger*, C. B., 8 M. & W. 338.

(b) *Morley v. Hay*, 3 Man. & Ry. 396.

upon the custom of the realm, having been brought against the defendant as a carrier, Lord *Mansfield* was of opinion that the plaintiffs were not entitled to recover; and said, he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price has been paid, it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. The plaintiffs were non-suited (c). "What the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down," was, in a recent case, considered to be a point not yet finally decided, the majority of the Court of Exchequer however strongly inclined to the latter supposition (d). Lord *Kenyon* held it to be an equitable lien adopted by the law, for the purposes of substantial justice. Hence the circumstance of the vendee having paid in part for the goods will not defeat the vendor's right of stopping them in transitu; the vendor has a right to retake them, unless the full price of the goods has been paid; and the only operation of a partial payment is to diminish the lien, *pro tanto* (e), for "though a vendor of goods may have been paid part of the price, he has all the rights of an unpaid vendor, until the whole has been paid" (f). The unpaid vendor may stop in transitu before the goods come to the hands of the vendee's factor, although the factor has the bill of lading, indorsed to order, in his hands, and is under acceptance to the vendee on a general account; wherefore, in such case, where the vendee became bankrupt, and the factor also became bankrupt, and the messenger under the factor's commission, upon the arrival of the ship, went on board and seized the cargo, the agent of the vendor having previously given notice to the captain to deliver the cargo to him, and the captain having agreed thereto; it was held, that trover would lie by the vendor against the assignee of the bankrupt factor (g).

The cases which have been decided on this subject may be arranged under the following divisions:—1st, Who shall be considered as capable of exercising the right of stopping in transitu; 2ndly, Under what circumstances the transitus shall be considered as continuing; 3rdly, When the transitus shall be considered as determined; and lastly, Where the right of the vendor has been defeated by the negotiation of the bill of lading.

(c) *Assignees of Burghall v. Howard*, London Sittings after Hil. T. 32 Geo. II., coram Lord *Mansfield*, C. J., 1 H. Bl. 366, n.

(d) *Wantworth v. Outhwaite*, 10 M. & W. 452. See *Clay v. Harrison*, 10 B. & C. 99; *Stephens v. Wilkinson*, 3 B. & Ad. 323; *Edwards v. Brewer*, 2 M. & W. 375.

(e) *Hodgson v. Loy*, 7 T. R. 440, recognized in *Feise v. Wray*, 3 East, 93, and *infra*, cited and distinguished in *Nicholls v. Hart*, 5 C. & P. 179, *Tindal*, C. J.

(f) *Per Parke, B.*, in *Van Castel v. Booker*, 2 Ex. 702; and in *Edwards v. Brewer*, 2 M. & W. 375.

(g) *Patten v. Thompson*, 5 M. & S. 350.

1. *Who shall be considered as capable of exercising the Right of Stopping in Transitu.*—As to the first division, there are two important cases in which the subject has been brought under the consideration of the court; viz., *Feise v. Wray*, 3 East, 93; and *Siffken v. Wray*, 6 East, 371. From these it may be collected, that if the party exercising the right stand in the relation of vendor, *quoad* the bankrupt or insolvent, it is sufficient; but that a mere surety, for the price of the goods, is not entitled to stop them in transitu. The case of *Feise v. Wray* was shortly this. B., a trader in England, gave an order to C., his correspondent abroad, to purchase a quantity of goods for him. C. bought the goods accordingly of another merchant, (who was a stranger to B. and had not any account or correspondence with him,) and shipped them on board a general ship, on the account and risk of B.; the bill of lading was filled up to the order of B.; C. drew bills of exchange on B. for the price of the goods, including also a charge for commission. These bills were accepted, but not paid; for, before the goods arrived, B. became a bankrupt; whereupon C. authorized his agent in England to obtain possession of the goods on their arrival, which he did accordingly. An action of trover having been brought by the assignees of B. against the agent of C., to recover the value of the goods; it was contended, on the part of the plaintiffs, that the right of stopping in transitu did not attach between B. and C.; that B. must be considered as the principal for whom the goods were originally purchased, and that C. was only his factor or agent, purchasing them on his account; and that the right of stopping in transitu did in point of law apply solely to the case of vendor and vendee; but, *per Lawrence, J.*, “If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens, for the most part, that orders come to the merchants here, from their correspondents abroad, to purchase and ship certain merchandize to them; the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But, at any rate, *this is a case between vendor and vendee; for there was no privity between the original owner of the goods and the bankrupt*; but the property may be considered as having been first purchased by C. and again sold to B. at the first price, with the addition of his commission upon it. He then became the vendor as to B. and consequently had a right to stop the goods in transitu, unless he is estopped by the circumstance of B. having accepted bills for the amount; which bills, it is contended, may be proved under B.’s commission, and are equivalent at least to part payment of the goods: but it was decided, in *Hodgson v. Loy*, 7 T. R. 440, that part payment for the goods does not conclude the right to stop

in transitu ; it only diminishes the vendor's *lien*, pro tanto, on the goods detained. Then, having lawfully possessed himself of them, he has a lien on them till the whole price be paid, which cannot therefore be satisfied by showing a part payment only. It is possible that part payment may be obtained by proving the bills under B.'s commission ; but if the loss must fall on one side or the other, the maxim applies, '*Qui prior est tempore potior est jure.*'" The court were of opinion, that the assignees were not entitled to recover. Since this case it has been held, that a consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them without tendering back the bill (h).

The facts of the case in *Siffken v. Wray* (i), were as follow :—B., a trader in London, ordered goods to be shipped to him by C., his correspondent at Dantzic, with directions to C. to draw for the amount on D. at Hamburg (who had agreed to accept the bills, upon receiving a commission on the amount), and to transmit the bills of lading and invoices to D., who was to forward them to B. in London. The goods were shipped, D. accepted the bills, and on the receipt of the bills of lading, transmitted the same, (which were made out to the orders of the shippers and not endorsed,) to B. in London, who received them, together with the invoices and letter of advice, five days after he had committed an act of bankruptcy. D.'s acceptances were afterwards dishonoured, whereby C. was obliged to take up the bills of exchange. J. S., the agent of D. in England, procured from B. the bills of lading, upon an undertaking that he would dispose of the goods, on their arrival, to the best advantage, and apply the proceeds to the discharge of the bills drawn against them. J. S., having obtained possession of the goods, sold them, and paid the proceeds into the Court of Chancery, to abide the verdict in an action directed by that court to be brought by the assignees of B. against J. S. C., having been apprized of what had been done by J. S., wrote a letter, signifying his approbation of J. S.'s conduct, and therein claimed the proceeds. The action directed by the Court of Chancery having been brought, the Court of B. R. were of opinion, that the assignees of B. were entitled to the proceeds : for, 1st, D. did not stand in the relation of vendor of these goods *quoad* the bankrupt, but was a mere surety for the price of the goods, and consequently, he was not entitled to stop them in transitu ; 2ndly, although C. was the vendor of the goods, yet J. S. could not be considered as his agent in this transaction, not having received any authority from C. until after he had obtained possession of the goods : but, supposing him to have been the agent of C. before, yet there was not any adverse taking pos-

(h) *Edwards v. Brewer*, 2 M. & W. 375, recognizing *Feise v. Wray*.

(i) 6 East, 371. See *Sweet v. Pym*, 1

East, 4 ; and *Pennell v. Alexander*, 3 E. & B. 283 ; 23 L. J., Q. B. 171.

session of the goods, inasmuch as they had been taken under an amicable agreement with B. after his bankruptcy (*k*).

A stoppage in transitu, to be valid, must be made during the transitu by the vendor or his agent duly authorized, hence a claim to stop, made by a stranger on behalf of the vendor, cannot, after the goods have been demanded by the vendee at their destination, be ratified by the vendor so as to divest the property in the goods (*l*).

There is no distinction with reference to the right of stoppage in transitu between the seller of goods of which the property is in the vendor, and the seller of the interest which he has in a contract for the delivery of goods to him (*m*).

2. *Under what Circumstances the transitus shall be considered as continuing.*—As a general rule, the goods will be considered to be in course of transit until either they have reached the place named by the buyer to the seller as that of their destination (*n*), or until they have come to the possession, actual or constructive, of the consignee (*o*). “The place of their destination, as I understand,” says Mr. Baron Parke, “means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition” (*p*). The goods are to be deemed in transitu, not only while they remain in the possession of the carrier, whether by land or by water, and although such carrier may have been appointed by the consignee (*q*), but also whilst they are in any place connected with the transmission and delivery of them (*r*).

The following cases will illustrate this. The first in order of time is *Stokes v. La Riviere*, cited in 3 T. R. 466, and more correctly by Lawrence, J., in *Bothlingk v. Inglis*, 3 East. 397. Messrs. Duhem, of Lisle, who had just arrived in London, applied to the plaintiff (a ribbon-weaver) for a quantity of ribbon. The plaintiff having received a favourable account, by the defendants, of Duhems’ circumstances, packed up goods to a large amount, and delivered them to the defendants to be forwarded to Lisle. These goods, with others purchased in like manner of another tradesman of the name of Twigge, were forwarded, on or about the 12th of May, to the defendants’ correspondents at Ostend, with directions to send them to

(*k*) See note (*i*), *supra*, p. 1221.

(*l*) *Bird v. Brown*, 4 Ex. 786; and see *Nicholls v. Le Feuvre*, 2 B. N. C. 81.

(*m*) *Per Tindal, C. J.*, delivering judgment of court in *Jenkyns v. Osborne*, 8 Scott, N. R. 505; 7 M. & G. 678.

(*n*) *Per Bailey, J.*, in *Coates v. Raitton*, 6 B. & C. 427; *Leeds v. Wright*, 3 B. & P. 320; *Dixon v. Baldwin*, 5 East, 175.

(*o*) *Wentworth v. Outhwaite*, 9 M. &

W. 534.

(*p*) In *Wentworth v. Outhwaite*, 10 M. & W. 450.

(*q*) *Stokes v. La Riviere*, cited 3 T. R. 466; *per Buller, J.*, in *Ellis v. Hunt*, 3 T. R. 469; *per Parke, B.*, in *James v. Griffin*, 2 M. & W. 632; *Smith v. Goss*, 1 Campb. 282.

(*r*) *Per Tindal, C. J.*, in *Dodson v. Wentworth*, 5 Scott, N. R. 833.

the order of Messrs. Duhem. On the receipt of the goods, *viz.* on the 29th of May, the defendants' correspondents at Ostend wrote to the Duhems an acknowledgment, and that they waited their directions. On the 12th June, the Duhems stopped payment; and, by an instrument signed the 13th of August, consented to Twigge's taking back his goods. But Messrs. Duhem not having fulfilled some engagement with the defendants, and being considerably indebted to them, the defendants countermanded the order they had given to their correspondents at Ostend, as to the delivery of the goods, by letter of the 31st May, and directed them to alter the marks and deliver them to their order, which was accordingly done; and they were afterwards disposed of in satisfaction of the defendants' demand upon Messrs. Duhem; they contending that, immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that they, the defendants, had a right to detain them. Lord *Mansfield* said, "No point is more clear, than if goods are sold, and the price not paid, the seller may stop them in transitu; I mean in every sort of passage to the hands of the buyers. There have been a hundred cases of this sort; ships in harbour, carriers, bills, have been stopped. In short, where the goods are in transitu, the seller has that proprietary lien. *The goods are in the hands of the defendants to be conveyed*; the owner may get them back again."

In *Hunter and another (Assignees of Blanchard and Lewis) v. Beal*, cited 3 T. R. 466, an action of trover was brought for a bale of cloth, which was sent by Messrs. Steers and Co. of Wakefield, to the defendant, who was an innkeeper, directed for the bankrupts, to whom the defendant's book-keeper gave notice that a bale was arrived for them: and Steers and Co. at the same time sent them a bill of parcels by the post, the receipt of which they acknowledged, and wrote word that they had placed the amount to the credit of Steers and Co. The bankrupts gave orders to the defendant's book-keeper to send the bale down to the Galley Quay, in order to ship it on board the *Union*, to be carried to Boston. The defendant accordingly sent the bale to the Quay; but, arriving too late to be shipped, it was sent back to him. Within ten days afterwards, a clerk of the bankrupts went to the defendant's warehouse, when the defendant asked him what was to be done with the bale in question, and was ordered to keep it in his custody till another ship sailed, which would happen in a few days. The bankruptcy happened soon afterwards; and Messrs. Steers and Co. sent word to the defendant not to let the bale out of his hands: accordingly, when the bankrupts applied for it, he refused to deliver it up. Lord *Mansfield* was clearly of opinion, that though the goods might be legally delivered to the vendees for many purposes, yet as for this purpose there must be an absolute and actual possession by the bankrupts, or (as his lordship expressed it) they must have come to the *cor-*

poral touch of the vendees; otherwise they may be stopped in transitu; a delivery to the third person, to convey them, is not sufficient. The preceding case of *Hunter v. Beal* was much commented upon by Lord *Ellenborough*, in *Dixon v. Baldwin* (s). The impression on his lordship's mind appears to have been against the determination. His words are these: "As to *Hunter v. Beal*, in which it is said, that the goods must come to the *corporal touch of the vendees*, in order to oust the right of stopping in transitu, it is a *figurative* expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual *touch*, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch it actually comes, be an agent so far representing the principal, as to make the delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier, or mean of conveyance to or on account of the principal, in a mere course of transit towards him. I cannot but consider the transit as having been once completely at an end in the direct course of the goods to the vendee; *i. e.* when they had arrived at the innkeeper's, and were afterwards under the immediate orders of the vendee, thence actually launched again in a course of conveyance from him, in their way to Boston; being in a new direction prescribed and communicated by himself. And if the transit be once at an end, the delivery is complete, and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination." In *Hunt and others (Assignees of Bennet and Heaven) v. Ward* (t), where goods had been sent by orders from the vendee to a packer; the packer was considered as a middle man between the vendor and vendee: and, therefore, the court held they might be stopped in transitu, on the bankruptcy of the vendee. So where A. sold goods to B., and, according to B.'s directions, sent them to C., a wharfinger, to be by him forwarded to B.; it was held, that while they were in C.'s hands, they might be stopped by A., because they were merely at a stage upon their transit, and could not be considered as having arrived at their final destination (u).

The plaintiff, living at Leghorn, consigned goods to B. at Liverpool, by a ship chartered on account of B. The captain signed three bills of lading, as usual, one of which was sent to B. Before the ship arrived at L., B. became a bankrupt. On the ship's arrival at L., she was ordered to perform quarantine. Pending the quarantine, one of the assignees of B. went on board the vessel, claimed the cargo as belonging to the bankrupt, and put two persons on board with a view of keeping possession. A few days

(s) 5 East, 184, recognized in *Wentworth v. Outwaite*, 10 M. & W. 436.

(t) Cited 3 T. R. 467.

(u) *Smith and another v. Goss*, 1 Campb. 282.

after, but before the expiration of the quarantine, the plaintiff's agent served a notice of the bankruptcy on the captain of the vessel, and claimed the goods on behalf of the plaintiff; a similar notice was served on the assignees, the defendants. It was contended, that the principal's right to stop in transitu was completely at an end when the consignee had got possession, by any means of the goods consigned: that the consignee might have met the vessel at sea on her voyage, and have taken possession by virtue of the first bill of lading; which possession, they contended, would be complete to divest any right the consignor might have to stop the goods in transitu: but Lord *Kenyon* was of opinion, that this was a stopping in transitu sufficient to maintain the action: his lordship said, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignee, on the completion of the voyage; that the case put, that the consignee had a right to go out to sea to meet the ship, could not be supported, as it might go the length of saying that the consignee might meet the vessel coming out of the port, from whence she had been consigned, and that that should divest the property out of the consignor and vest it in himself, which was a position not to be supported (x), as there would be then no possibility of any stoppage in transitu at all. That in the present case the voyage was not completed, till she had performed quarantine, till which time she was in transitu; and as the plaintiff's agent had given notice, and claimed the cargo before the completion of the voyage, he was of opinion that the plaintiff had stopped the goods in time enough to prevent the property from vesting in the assignees. The Court of B. R., on a motion for a new trial, confirmed the opinion given by Lord *Kenyon* (y). The like judgment was given in the case of *Northey and another (Assignees of Leyland and another) v. Field*, 2 Esp. N. P. C. 613. There a quantity of wine was consigned to B. After the arrival of the vessel, aboard which the wine in question had been shipped, but pending the twenty days allowed for payment of the duty, B. became a bankrupt. After the expiration of the twenty days the wine was removed into the king's cellar, where by the excise law it was allowed to remain three months: during which time the owner might have the wine on paying the duty, warehouse-room, &c.: but if not paid at the end of the three months, the wine would be sold. The day before the expiration of the three months, the agents of the consignors applied for, and endeavoured to obtain, possession of the wine, but in vain. The wine was sold, and the produce paid into the hands of a broker. An action having been brought by the assignees of the bankrupt, who claimed the produce, Lord *Kenyon* was of opinion, that they were

(x) But see *Oppenheim v. Russell*, 3 B. & P. 54; *Foster v. Frampton*, 6 B. & C. 107; *Whitehead v. Anderson*, 9 M. & W. 518; *Mills v. Ball*, 2 B. & P. 461;

Valpy v. Gibson, 4 C. B. 837.

(y) *Holst v. Pownall and another*, 1 Esp. N. P. C. 240.

not entitled to recover ; observing, that the courts of late years had inclined much in favour of the power of the consignor to stop his goods in transitu, it was a leaning to the furtherance of justice. Lord *Hardwicke* had been of opinion, that in order to stop goods in transitu, there must be an actual possession of them obtained by the consignor, before they come to the hands of the consignee ; but that rule has since been relaxed ; and it was now held, that an actual possession was not necessary, that a claim was sufficient, and to that rule he subscribed. In the present case, the bankrupt had no title to the actual possession, until the duties were paid—until then they were *quasi in custodia legis* ; before the sale, the agent for the consignors claimed, and endeavoured to get possession ; that was a sufficient stopping in transitu, in his opinion, to secure the rights of the consignor.

B., resident in Cumberland, purchased a quantity of butter from A., who agreed to deliver it to D., a carrier. B. desired that it might be marked with the initials of C., his brother's name, to whom he usually sent his butter consigned for sale on his own account, and which initials B. had constantly used for some years upon such consignments. The butter was delivered by the vendors to D., the carrier agreed on, who was desired by B. to forward it as usual to a wharfinger usually employed by B., at Stockton, to be by him shipped for London. It was stated in the case that D. entered the butter in his way-bill in the name of B., and carried it on his account, the vendor telling him that B. was to pay the carriage. He carried the firkins as far as Bowes, where he delivered them to E., another carrier, who received no other instructions but from the way-bill ; E. proceeded with them to Stockton, and there delivered them to the wharfinger, who had general directions from B. to send to C., his brother in London. The wharfinger immediately wrote to B. acknowledging the receipt of the butter, and also to C., and acquainted the latter with the name of the ship by which the butter was to be forwarded to London. Before the butter reached London, B. and C. became bankrupts, and the defendant, as agent of the seller, got possession of the butter on its arrival in the river. In an action brought by the assignees of B., one of the questions was, whether there was any such delivery to the bankrupt as was sufficient to divest the vendor's right to stop in transitu. It was contended on the part of the defendant that there was not ; that the delivery to D., in the first instance, and afterwards that by him to E., and by E. to the wharfinger, were all deliveries made to them in the capacity of common carriers, and not as private agent of the bankrupt. The circumstance of the bankrupt desiring D. to carry the goods to the wharfinger as usual could not vary the nature of the agency. But supposing it did, and that it amounted to the appointment of the wharfinger as a special carrier named by the vendee, that would not alter the

vendor's right to stop in transitu (z); that *Buller, J.*, has expressly said in *Ellis v. Hunt*, 3 T. R. 469, that that would make no difference, and that the case of *Stokes v. La Riviere*, where the right was allowed, was a case of delivery to a particular carrier; and as to the mark on the goods, that was not for the purpose of taking possession of them, as in *Ellis v. Hunt*, but merely as a direction to whom they were to be sent. The court were of opinion, that the defendant was entitled to stop the goods in transitu. Lord *Ellenborough*, adverting to the preceding case, in *Dixon v. Baldwin*, 5 East, 185, observed, "that it was a clear case of transit uncompleted; for the butter purchased in Cumberland was proceeding through different stages of country conveyance to the purchaser in London, but before it reached the place of its destination it was stopped" (a).

B., being in trade at North Tawton, in Devonshire, gave orders to the plaintiffs to send the goods in question to him from London, but did not direct that they should be sent by any particular ship (b); his orders were that they should be sent to him at Exeter, to be forwarded to N. T. They were accordingly shipped, arrived at Exeter, and were put into the hands of the wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of B. as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things a letter was received by the plaintiffs, in which the vendee said, that his situation was such that he should not receive the goods, and that they might take them back again, if they thought proper. The plaintiffs, immediately on the receipt of this letter, sent to the wharfinger, and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them until he could do so with safety, notwithstanding which he afterwards delivered them to the assignees of B. The question was, whether the goods, in the hands of the wharfinger, were in such a situation that the vendors could stop them. The court were of opinion that they were, and that in point of fact the goods had been stopped in transitu; for, although there had not been any corporal touch, yet that took place which was equivalent to it. The plaintiffs gave notice to the wharfinger and demanded the goods as their property; and the wharfinger undertook not to deliver them until he was certain of a safe delivery. *Chambre, J.*, added, that there was another point, however, upon which he had entertained some doubt. The vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information, but through the intervention of the bankrupt himself, eight days after the act of bankruptcy committed. That circumstance raised some doubt in his mind; since it appeared that

(z) See *post*, p. 1232.

(a) *Hodgson v. Loy*, 7 T. R. 440.

(b) *Mills v. Ball*, 2 B. & P. 457.

the bankrupt had thereby given a preference to the plaintiffs over the rest of his creditors. But, as no fraud appeared to have been committed on the part of the plaintiffs in this case, he was inclined, on this point, as well as the others, though not without some doubt, to concur with the rest of the court (*c*).

It only remains to observe, that where the right of stopping in transitu vests in the consignor, it cannot be divested by any claim made upon the goods in their transit by a creditor of the consignee, as, *e. g.*, by process of foreign attachment at the suit of such creditor (*d*), or by a common carrier, claiming to retain the goods as a lien for his general balance due from the consignee; for the vendor's right of stopping in transitu is the elder and, preferable lien (*e*).

If a carrier, after notice from the vendor of goods to stop them in transitu, nevertheless delivers them to the vendee, the vendor may maintain trover for them against the vendee; and although the vendee having become a bankrupt, the goods have passed into the hands of his assignees, yet, inasmuch as they did not come to the possession of the bankrupt, with the consent of the true owner, they are not, in the order and disposition of the bankrupt, within the statute (*f*). So, conversely, a formal demand of the goods on part of the consignee at the place to which they are consigned, will determine the transitus, and trover will lie against a person to whom they are delivered on behalf of the consignor after such demand (*g*). To make a notice effective as a stoppage in transitu, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in *Litt v. Cowley* (*h*), at such a time and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee (*i*). Although goods have been delivered at the packers of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and instructions to that effect were given to the packer by the vendor, they may still be stopped in transitu (*k*). A resale of goods by a vendee, and payment to him, does not destroy the vendor's right of stoppage in transitu (*l*). An order sent by the vendor to the wharfinger to deliver the goods to the vendee, is sufficient to pass the property to the vendee, provided nothing remains to be done but to make the delivery; but if anything remains to be done,

(*c*) *Mills v. Ball*, 2 B. & P. 457.

(*d*) *Smith v. Goss*, 1 Campb. 282.

(*e*) *Butler v. Woolcott*, 2 N. R. 64.

(*f*) *Litt v. Cowley*, 7 Taunt. 169.

(*g*) *Bird v. Brown*, 4 Exch. 786. See also *Heinekey v. Earl*, 28 L. J., Q. B. 79.

(*h*) See note (*f*), *supra*.

(*i*) *Per Parke, B.*, delivering judgment

of court in *Whitehead v. Anderson*, 9 M. & W. 534.

(*k*) *Loeschman v. Williams*, 4 Campb. 181.

(*l*) *Craven v. Ryder*, 6 Taunt. 433, recognized in *Dixon v. Yates*, 5 B. & Ad. 343. See *Jones v. Jones*, 8 M. & W. 431.

e.g., weighing, &c., the property does not pass, and the right of stoppage in transitu is not defeated until that be done (*m*). Where goods were sold, free on board, and upon their shipment the agent of the vendors tendered to the mate, (the captain being absent,) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, and on the following day signed bills of lading to the orders of the vendees; it was held, that the transitus was not at an end, but that on the insolvency of the vendees, the vendors were entitled to stop the goods (*n*). So where A. delivered a quantity of iron to a carrier to be conveyed to B., the vendee in the country, and the carrier, on his arrival at B.'s premises, landed a part of the iron on his wharf, and then, finding that B. had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises; it was held, that there was not a delivery of any part of the iron, so as to divest the consignor of his right to stop in transitu, the special property remaining in the carrier, until the freight for the whole cargo was either tendered or paid, or until he had done some act showing that he assented to part with the possession of the goods, without receiving his freight (*o*).

The transitus is not, as has been before remarked, in general, at an end until the goods have reached the place named by the buyer to the seller, as the place of their destination. Goods were purchased by a commission agent, at Manchester, for A., *to be sent to Lisbon*. A. had no warehouse at Manchester, and the vendor delivered the goods to the agent, who was to forward them to Lisbon: it was held, that the transitus continued until the goods reached Lisbon; and that, the vendee having become insolvent, the vendor might stop the goods in the hands of the agent (*p*). So where the shippers acting for G. purchased and paid for, with their own money, flour at Stockton, which was sent by a vessel to London, and the invoice was forwarded to G. A manifest of the flour was also forwarded by the shippers to a wharfinger in London, whose practice it was to deliver goods to the consignee named in the manifest, upon application, and till application to keep them on board the vessel; if not applied for before the vessel returned, he landed them, and kept them in his warehouse to the order of the shipper; if the goods were to be delivered to order, he delivered them to persons producing either bills of lading or the shipper's invoice. G. was in the habit of having flour consigned to him at the wharf, and sometimes sold it on board, sometimes when it was landed, and kept for him in the wharfinger's warehouses. The flour

(*m*) *Withers v. Lys*, Holt's N. P. C. 18; 4 Campb. 237. See *Lackington v. Atherton*, 8 Scott's N. R. 43; 7 M. & G. 360, recognizing *Dixon v. Yates*, 5 B. & Ad. 313.

(*n*) *Ruck v. Hatfield*, 5 B. & A. 632.

See *Cowas-jee v. Thompson*, 5 Moo. P. C. C. 165; 3 Moo. Ind. App. 422.

(*o*) *Crawshaw v. Eades*, 1 B. & C. 181.

(*p*) *Coates v. Railton*, 6 B. & C. 442. See also *Nicholls v. Le Feuvre*, 2 B. N. C. 81.

in question arrived at the wharf on the 12th of April, but was not landed until the 22nd;—on the 17th of April, and before any application by G., who had become bankrupt, the flour was claimed under an order from the shippers, it was held, that the shippers might stop it in transitu; for no act of ownership had been exercised over it by G., no invoice or bill of lading had been produced by him or any agent; so that the very first act done upon the flour, after the ship's arrival at the wharf, was done by the shipper, before the transit to the hand or possession of the vendee was complete (g). The transitus continues until the goods have reached their ultimate destination under the contract of sale, or the vendee has given the direction to the goods (r). Goods were consigned to A., to be delivered in the river Thames; on the arrival of the vessel in the river, the captain pressed A. to have them landed immediately: A., in consequence, sent B. his son with directions to land them at a wharf, where he was accustomed to have goods landed for him and kept until he carted them away to customers in his own carts; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, and there stopped in transitu by the vendor: in trover for the goods, by the assignees of A. against the wharfinger, it was held, that the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger, and that they showed that A. had not taken possession of the goods as owner; and, therefore, that the transitus was not determined (s).

The general rule is, that the transitus is not at an end until the goods arrive at the actual or constructive possession of the consignee; and a mere demand by the consignee, without any delivery, before the voyage has completely terminated, does not deprive the consignor of his right of stoppage (t). Hence, where M. purchased lead of the plaintiff at Newcastle, without specifying any place of delivery; after a time M. desired that it should be forwarded to him in London, and plaintiff gave M.'s agent at Newcastle an order on plaintiff's servant for its delivery; the agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London; the vessel arrived on the 21st of June, and defendants, as wharfingers, undertook the delivery of the lead; M. failed on that day; on the 23rd and 24th, M. demanded the lead of the captain of the vessel, who refused to deliver it, though the freight was tendered, alleging that defendants had

(g) *Tucker v. Humphrey*, 4 Bingham. 516. See also *Bartram v. Farebrother*, 4 Bingham. 579.

(r) *Morley v. Hay*, 3 Man. & Ry. 396.

(s) *James v. Griffin*, 2 M. & W. 623, per three Barons, Lord Abinger, C. B.,

diss. See *Heinekey v. Earle*, 28 L. J., Q. B. 79.

(t) See judgment of Court of Exchequer, delivered by Parke, B., *Whitehead v. Anderson*, 9 M. & W. 534.

stopped it on account of the failure of M. On the 28th, a letter arrived from plaintiff, ordering the lead to be stopped in transitu; it was then on board a lighter belonging to defendants; it was held, that the transitus was not at an end, and that plaintiff was in time to stop the lead (*u*). The effect of a stoppage of part of the goods contained in a joint contract, is to give the vendor a right to retain the part actually stopped in transitu till he is paid the price of the whole, but does not give him a right to retake that which has arrived at its journey's end (*v*).

3. *When the Transitus may be considered as determined.*—We now proceed to the third division, under which it is proposed to arrange those cases in which it has been decided that the transitus was complete, and the delivery of such a nature as to divest the vendor's right of stopping in transitu.

The first case, on this branch of the subject, is that of *Ellis v. Hunt*, 3 T. R. 464, the facts of which were shortly these: B. ordered a quantity of files from the plaintiff, a manufacturer at Sheffield; the files were packed in a cask, and sent by a waggon, directed to B. in London. Before their arrival in London, B. became a bankrupt. On their arrival there, the goods, while they remained at the inn, were attached by a creditor of the bankrupt by process of foreign attachment; afterwards, the provisional assignee under B.'s commission demanded the goods from the carrier, and put his mark upon the cask, but did not take them away. A few days afterwards, the plaintiff, who had not been paid for his goods, wrote a letter to the carrier, directing him, in case the goods were not delivered, to keep them in his warehouse, as he had been informed that B. had become a bankrupt. The court were of opinion, that the goods were not in transitu at the time when the plaintiff wrote to countermand the delivery of them; before that, the provisional assignee, who stood in the place of the bankrupt, had put his mark on the cask (*x*); when the goods were marked, they were delivered to the commissioners as far as the circumstances of the case would permit, for, being under an attachment, the assignee could not then take them away.

In some cases a delivery of part of the goods will operate to determine the transitus as to the whole; but the rule that a part delivery in point of law operates as a constructive delivery of the whole, is confined to cases where the delivery of part is intended to be a delivery of the whole (*y*); and if part be delivered with an intent to separate that part from the rest, it is not an inchoate

(*u*) *Jackson v. Nichol*, 5 B. N. C. 508.

(*v*) *Wentworth v. Outhwaite*, 10 M. & W. 436.

(*x*) See *Stoveld v. Hughes*, 14 East,

308, and *post*, p. 1238.

(*y*) *Bunney v. Poyntz*, 4 B. & Ad. 558; *James v. Griffin*, 2 M. & W. 623.

delivery of the whole (z). Where the vendee takes possession of a part of the goods in the progress of, and with a view to, the delivery of the whole, such taking possession will determine the transitus as to the whole; but where the vendee means to separate the part delivered from the rest, and to take that part only on that occasion, then the transitus will be determined as to that part only; and the right of lien and the right of stoppage in transitu on the remainder will still continue (a). A., at a foreign port, shipped goods by order and on account of B., to be paid for on a future day, and bills of lading were accordingly signed by the master of the ship; one of the bills was immediately transmitted to B., who, before the arrival of the ship at the place of destination, sold the goods and indorsed the bill of lading to C.; and after the arrival of the ship, and delivery of part of the goods to the agent of C., B. became bankrupt, without having paid A. the price of the goods. It was held, that the transitus was ended by the part delivery, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of the delivery, to separate part of the cargo from the rest (b). A number of bales of bacon, which were lying at a wharf, having been sold for an *entire* sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the *whole*, and took away several bales, and then became bankrupt: whereupon the vendor, within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. By the custom of the trade, the charges of warehousing were to be paid by the vendor fourteen days after the sale. It was held, that the contract being *entire*, and part having been taken away, the delivery to the vendee was complete, and, consequently, the privilege of stopping in transitu could not attach (c); *Chambre, J.*, observing, that the payment of the warehouse-room by the vendor, could not make any difference: that the vendor, of course, charged just so much more as would pay the expense of warehouse-room: that if the expense had been paid by the vendee it would not make a delivery at the wharf a delivery to him; nor could the vendor avail himself of the circumstance of the expenses being paid by him to prevent a delivery to the vendee from operating as such. This was a much stronger case than the preceding one of *Slubey v. Heyward*: that proceeded upon the principle that a delivery of part, where the contract was *entire*, was a delivery of the whole; here there was an actual delivery of the whole. The bankrupt had actual manual possession of every article, and having weighed them all, he took upon himself to separate them (d).

(z) *Per Parke, J., Dixon v. Yates*, 5 B. & Ad. 341.

(a) *Tanner v. Scovell*, 14 M. & W. 37. See *Exp. Cross*, 1 Fonbl. N. R. 215.

(b) *Slubey v. Heyward*, 2 H. Bl. 504.

(c) *Hammond v. Anderson*, 1 N. R. 69.

(d) The two last cases of *Slubey v. Heyward*, and *Hammond v. Anderson*,

If a person purchase goods here, to be sent abroad, and they are delivered in a port of this kingdom, on board a ship chartered by, and under the complete control of, the vendee, such delivery is in effect a delivery to the vendee unless the bills of lading otherwise provide. Trover by the assignees of bankrupts to recover the value of a quantity of tobacco shipped by the defendants, by order of the bankrupts, on board a ship bound from London for Alexandria, which ship was chartered to the bankrupts for three years, from July, 1792, and which was paid for by a bill at three months, drawn by the defendants, on the bankrupts, and accepted by them. The goods were shipped on the 4th of February, 1793, for which the mate's receipt was given, and an invoice thereof made out by the defendants in the names of the bankrupts; the bankrupts were to find stock and provisions, and to pay the master. The vessel was detained by contrary winds at Portsmouth: during which time, the bankrupts having stopped payment about the 11th of March, 1793, the defendants procured bills of lading to be signed by the captain to them, and obtained possession of the tobacco in September, 1794, and procured it to be re-landed, and afterwards disposed of for their benefit. It was held, that the delivery was complete, by putting the goods on board the ship, and consequently, that the assignees were entitled to recover (e). It will be observed, that, in the preceding case, the bankrupts were to have the entire disposition of the ship and the complete control over her during the three years. The ship had been one voyage to Alexandria, and had the goods put on board her, to carry them on another voyage to the same place; not for the purpose of conveying them from the vendors to the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them (f). From not adverting to these material circumstances, an inference was drawn from the preceding decision, which the case did not warrant, namely, that the right of stopping in transitu could not exist after a delivery of goods on board a chartered ship. This opinion, however, was exploded in the case of *Bothlingk v. Inglis*, 3 East, 381. There a trader who resided in England chartered a ship, on certain conditions, for a voyage to Russia, and to bring goods home from his correspondent there, who accordingly shipped the goods on account, and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo. It was held, that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while in transitu on board the same to the vendee, in case of his insol-

underwent some discussion in *Hanson v. Meyer*, 6 East, 614 (which see, under tit. "Trover," sect. 1; in *Bunney v. Poyntz*, 4 B. & Ad. 568; and in *Tanner v. Scovell*, 14 M. & W. 28: but their authority does not appear to have been shaken. See

also *Jones v. Jones*, 8 M. & W. 431.

(e) *Fowler v. M'Taggart*, cited 7 T. R. 442; 1 East, 522; 3 East, 388. See 6 Ex. 566.

(f) *Per Lawrence, J.*, 3 East, 396, 397.

vency, in the mean time, before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. There is no doubt that a delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery (*g*). And this the vendor may do by taking bills of lading, making the goods deliverable to his order or assigns (*h*). For the vendor thereby reserves to himself, at the time of delivery to the captain, the *jus disponendi* of the goods, which the captain by signing the bills of lading acknowledges, and without which it may be assumed that the vendor would not have delivered them at all (*i*). And if the bills of lading so taken are indorsed in blank, and transmitted by the vendor to his own agent, to be delivered up on performance of a condition, such as acceptance of bills of exchange, the vendor will preserve his right of property in the goods until such condition is performed (*k*).

Goods were shipped by the vendor on board a general ship belonging to a firm of which the purchaser was a member, and registered in the purchaser's name. Three parts of the bill of lading (by which the goods were deliverable at the port of destination to the purchaser or assigns) were handed to the vendor, and the fourth part was retained by the master. It was held that the delivery on board was not a delivery to the purchaser so as to preclude stoppage in transitu (*l*).

The plaintiff, a manufacturer at Norwich, agreed with I. S. for the purchase of some pipes of wine, one of which was to be paid for in money, and for the remainder I. S. was to take goods. I. S. wrote to C., his correspondent in London, to send the wines; C. accordingly purchased the wines of D., shipped them, and, by the bill of lading, consigned them to the plaintiff, by a vessel employed in the course of trade between Yarmouth and London. On the arrival of the wine at Yarmouth, an agent for the plaintiff received it on his account, and deposited it in the cellar of the defendant, who was to be paid for the cellar room by the plaintiff. A few days after, the plaintiff arrived at Yarmouth, tasted the wines and took samples of them. Shortly afterwards, D., discovering that C., to whom he had sold the wines, was a man of no property, desired the defendant to keep possession of the wine, giving him an indemnity. The plaintiff having brought this action for the recovery, the payment for one pipe, and the agreement as to the remainder,

(*g*) *Per Patteson, J.*, 6 Ex. 567. See *Ogle v. Atkinson*, 5 Taunt. 759; *Coze v. Harden*, 4 East, 211; *Cowas-jee v. Thompson*, 5 Moo. P. C. C. 165; 3 Moo. Ind. App. 422.

(*h*) *Turner v. The Liverpool Docks*, 6 Ex. 543; *Van Casteel v. Booker*, 2 Ex. 691; *Wait v. Baker*, 2 Ex. 1; *Eller-*

shaw v. Magniac, 6 Ex. 570. See *Brown v. North*, 8 Ex. 1; *Jenkyns v. Brown*, 14 Q. B. 496.

(*i*) See note (*g*), *supra*.

(*k*) *Key v. Coldsworth*, 7 Exch. 595; *Gurney v. Behrend*, 3 E. & B. 622.

(*l*) *Schotsman v. Lancashire and Yorkshire Railway*, L. R., 1 Eq. 349.

was proved. This, in Lord *Kenyon's* opinion, gave the plaintiff a title to the whole. It was then contended, that, as the plaintiff lived at Norwich, the goods must be deemed to be in transitu until they arrived there; whereas here, they had arrived only at Yarmouth, and had never been delivered at Norwich; that the usual course was, to put them into lighters, at Yarmouth, and forward them to Norwich; so that, until their arrival there, they were in transitu, and could be stopped by the owners. But *per* Lord *Kenyon*, "There is no colour for saying that these goods were in transitu. I once said, that to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place: but all that is necessary is, that the consignee exercise some act of ownership on the property consigned to him, and he has done so here; he has paid for the warehouse room; he has tasted and taken samples of the wines; but it is said, they have not reached the plaintiff's place of abode, where they were to be ultimately delivered; but I think there was a complete delivery at Yarmouth" (*m*). *Valpy v. Gibson* (*n*), affords an example of the sort of act of ownership that will determine the right of stoppage; in that case certain goods were ordered at Manchester for Valparaiso, they were forwarded to a shipping-agent at Liverpool by the vendors, with instructions "to be directed as the vendee might direct them to be shipped." The vendee *had the goods sent to a packer's to be repacked*, and, before they were out of the packer's hands, became insolvent. It was held, that the transitus was at an end, if not on the delivery of the goods to the shipping-agent, at any rate on the vendee exercising dominion over them, notwithstanding that their ultimate destination was Valparaiso.

The reader will have collected from the cases in the preceding section, *viz. Hunt v. Ward*, and *Mills v. Ball*, that where goods have been delivered to a packer or wharfinger, for the purpose of being forwarded to an ulterior destination, and the packer or wharfinger may be considered merely as a middle man, in such cases the right of stopping in transitu remains. It now becomes necessary to remark, that, where the insolvent has no warehouse, or no other place of delivery than the warehouse of the packer, &c., and there is no place of ulterior delivery in view, the transitus will be considered as at an end when the goods have arrived at such warehouse, that being their last place of delivery. The following cases will illustrate this rule:—

Trover for goods. The goods in question had been ordered by the bankrupt, who was a merchant in London, of Messrs.

(*m*) *Wright v. Larves*, 4 Esp. 82.

(*n*) 4 C. B. 837. See *Loeschman v. Williams*, 4 Campb. 181, *ante*, p. 1228.

Waller, of Manchester, and were forwarded by them, directed to the bankrupt, at the Bull and Mouth Inn, on the 16th of March, 1802. On the 23rd of March, the goods were sent from the Bull and Mouth Inn to the defendant's house, who was a packer, not in consequence of any orders respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the defendant's house. On the 11th of March, the bankrupt, who lived in lodgings, and *had no warehouse of his own*, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the defendant's house, they were booked for the account of the bankrupt; and the defendant, not knowing that the bankrupt had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked, with a view to ascertain of what they consisted. On the 31st of March, Messrs. Wallers having learned the situation of the bankrupt's affairs, claimed the goods from the defendant; and on the day after, they were demanded by the assignees. The defendant, being indemnified by Messrs. Wallers, refused to deliver the goods to the plaintiffs. It was held that the transitus was at an end, inasmuch as there was not any other place of delivery than the warehouse of the packer; the goods, when arrived there, had come to their last place of delivery, and consequently were no longer liable to the right of stoppage in transitu (*o*). So where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place; but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the transitus is thereby determined; and, therefore, where the vendee of several hogsheads of sugar, upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience, desired the carrier to let them remain in his warehouse, until he should receive further directions; and before they were removed became bankrupt; it was held, that the transitus was at an end, and that the vendor was not entitled to stop them (*p*). So where goods were sent by water-carriage and deposited in the carrier's warehouse at the end of the voyage, in the usual course of business between him and the consignee, *viz.* to be delivered out to him or to his customers as they should be wanted, without being sent to his residence elsewhere; it was held, that the transitus was determined, and that the vendor's right to stop the goods was gone, though the carrier claimed, as such, a lien on the goods against the consignee (*q*). So where the goods have so far got to the end of their journey, that they wait for

(*o*) *Scott v. Pettit*, 3 B. & P. 469. See also *Leeds v. Wright*, 3 B. & P. 320.

(*p*) *Foster v. Frampton*, 6 B. & C. 107. See *Whitehead v. Anderson*, 9 M. & W. 518.

(*q*) *Allen v. Gripper*, 2 Tyrw. 217; 2 Cr. & J. 218, cited by *Tindal*, C. J., in *Dodson v. Wentworth*, 4 M. & G. 1080 5 *Scott's N. R.* 821.

new orders from the purchaser to put them again in motion, to communicate to them another substantive destination; and if, without such orders, they would continue stationary, the right of stopping in transitu is gone. A. and B., traders living in London, were in the course of ordering goods of the defendants, cotton manufacturers at Manchester, to be sent to M. and Co. at Hull, for the purpose of being afterwards sent to the correspondents of A. and B. at Hamburg; and on the 31st of March, A. and B. sent orders to the defendants for certain goods, to be sent to M. and Co. at Hull, to be shipped for Hamburg as usual. It was held, that, as between buyer and seller, the right of the defendants to stop, as in transitu, was at an end when the goods came to the possession of M. and Co. at Hull, for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull were to receive a new direction from the vendees (*r*).

A trader in London was in the habit of purchasing goods at Manchester, and exporting them to the Continent soon after their arrival in London. The goods so consigned to him remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent, for the purpose of being shipped. A consignment of goods for the trader was delivered to the defendants on the 9th and 12th of August; on the 14th and 17th the goods arrived at the waggon-office of the defendants: on the 16th or 17th the trader became bankrupt; and, on the 19th, notice of non-delivery to the bankrupt was given by the consignor to the defendants, who, according to order, on the 21st delivered the goods to a third house: it was held, that the assignees of the bankrupts were entitled to recover the goods deposited with the defendants: and that the right of the consignor to stop in transitu ceased on the arrival of the goods at the waggon-office of the defendants in London (*s*). So if, after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse-rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them in transitu (*t*).

On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of the goods to him in the warehouseman's book, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as the weighing of an article forming part of a bulk, and sold by weight. But if the identity and quantity are ascertained, as where the oats in par-

(*r*) *Dixon v. Baldwin*, 5 East, 175; *Dodson v. Wentworth*, 4 M. & Gr. 1080; 5 Scott's N. R. 821; *Wentworth v. Outhwaite*, 10 M. & W. 436; see *Valpy v.*

Gibson, 4 C. B. 837, *ante*, p. 1235.

(*s*) *Rowe v. Pickford*, 8 Taunt. 83.

(*t*) *Hurry v. Mangles*, 1 Campb. 452. See *Miles v. Gorton*, 2 C. & M. 504.

ticular bin which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu (*u*). So where the purchaser of goods received from the seller an order to the wharfinger in whose warehouse the goods were deposited, to deliver them; and the purchaser, having lodged the order with the wharfinger, he transferred the goods into the name of the purchaser; it was held, that by such transfer the wharfinger became a trustee for the purchaser, and there was an executed delivery as much as if the goods had been delivered into the hands of the purchaser (*x*). So where goods being entered in the books of the West India Dock Company in the name of A., he received the usual check for them, which, having sold the goods for money to B., he indorsed and delivered to him, and B. afterwards sold the goods on credit and delivered the check to C.; it was held, that on C.'s insolvency, A. could not (for the benefit of B.) stop the goods, although they continued to stand in his name, and he paid rent for them, and although the check had not been lodged with the Dock Company (*y*). So where the defendants sold to I. S. a quantity of timber, then lying at their wharf, for the price of which I. S. gave the defendants bills payable at a future day; I. S., having marked the timber with his own mark, afterwards sold it to the plaintiff, who paid him for the same. The plaintiff went to the wharf, apprized the defendants of his purchase, received for answer *that it was very well*, and that they would go with him and show him the timber, which they accordingly did, and thereupon the plaintiff put his own mark on the timber. The bills given by I. S. to the defendants having been dishonoured, they claimed to stop in transitu; but it was held, that there was an executed delivery, and that the plaintiff having given notice to the defendants that I. S. had sold the property to him, and his then marking it as his own, made an end of the transit, and the defendants could no longer detain or stop the timber. Lord *Ellenborough*, C. J., observed in this case, that the change of mark from A. to B. on bales of goods in a warehouse had been held, by the House of Lords, in a late case, to operate as an actual delivery of the goods (*z*). Where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage of the goods in transitu can take place (*a*).

4. *How far the Negotiation of the Bill of Lading may tend to defeat the Right of Stoppage in Transitu.*—Where the property

(*u*) *Swanwick v. Sothorn*, 9 A. & E. 895. See *Godts v. Rose*, 17 C. B. 229; *Acraman v. Morrice*, 8 C. B. 449.

(*x*) *Harman v. Anderson*, 2 Campb. 243. See *Lackington v. Atherton*, 8 Scott, N. R. 38; 7 M. & G. 360; *Whitehouse v.*

Frost, 12 East, 614.

(*y*) *Spear v. Travers*, 4 Campb. 251. See *Tanner v. Scovell*, 14 M. & W. 28; *Kingsford v. Merry*, 1 H. & N. 503.

(*z*) *Stoveld v. Hughes*, 14 East, 308.

(*a*) *Noble v. Adams*, 7 Taunt. 59.

in goods has passed to a vendee, subject only to be divested by the vendor's right to stop them while in transitu, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration, *bonâ fide*, and by indorsement of the bill of lading, (without notice of such circumstances as render the bill of lading not fairly and honestly assignable,) has given him a right to recover them (*b*): for the indorsement of a bill of lading for a valuable consideration, and without notice to the indorsee of a better title, passes the property (*c*). "Ever since the great case of *Lickbarrow v. Mason*, the law has been considered to be, that the *bonâ fide* transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods freed from the equitable right of the unpaid vendor to stop in transitu, as against the purchaser; and we (the Queen's Bench) believe it to be of essential importance to commerce that this law should be upheld" (*d*). The legal title, however, of the indorsee of a bill of lading may be impeached on the ground of fraud (*e*). Thus, if the intended vendee of goods, in fraud of the vendor, procures the master improperly to sign bills of lading without delivery up of the mate's receipt, such bills of lading will convey no title to an innocent indorsee as against the vendor, though they may subject the master or his owners to an action (*f*). But the mere circumstance of the indorsee knowing at the time when the bill of lading was indorsed and delivered to him, that the consignor had not received money payment for his goods, but had only taken the consignee's acceptances, payable at a future day not then arrived, is not sufficient to invalidate the title of the indorsee, in a case where the absence of fraud and *mala fides* is found (*g*).

Where the vendor's legal right of stopping in transitu had been determined by the indorsement of the bill of lading, but such transfer had been made only as a security for advances made by the indorsee; it was held, upon reference to an arbitrator, that in a court of equity, such transfer would be treated as a pledge or mortgage only, and that the vendor had an equitable *quasi* right of

(*b*) *Lickbarrow v. Mason*, 2 T. R. 63; 1 Sm. Lead. Cas. See the argument of *Buller, J.*, 6 East, 21, n.

(*c*) See further, as to the operation of a bill of lading, the judgment of *Tindal, C. J.*, in *Jenkyns v. Osborne*, 7 M. & G. 678; 8 Scott, N. R. 505; *Thompson v. Doming*, 14 M. & W. 403; 18 & 19 Vict. c. 111.

(*d*) Judgment in *Gurney v. Behrend*, 3 E. & B. 637; 23 L. J., Q. B. 265, See *Pennell v. Alexander*, 3 E. & B. 283; *Turner v. The Liverpool Docks*, 6 Ex. 543; 20 L. J., Ex. 393; *Ellershaw*

v. Magniac, 6 Ex. 570.

(*e*) *Wright v. Campbell*, 4 Burr. 2046; *Salomons v. Nissen*, 2 T. R. 674.

(*f*) *Schuster v. McKellar*, 7 E. & B. 704.

(*g*) *Cuming v. Brown*, 9 East, 506. See further on this subject, *Coxe v. Harden*, 4 East, 211; *Waring v. Cox*, 1 Campb. 369; *Barrow v. Coles*, 3 Campb. 92; *Mitchel v. Ede*, 11 A. & E. 888; 3 P. & D. 513; *Wilmshurst v. Bowker*, 2 M. & G. 792; 3 Scott's N. R. 272; 7 M. & G. 882; 8 Scott, N. R. 571.

stoppage in transitu, subject to the previous right of the indorsee to be repaid his advances (*h*): "for although the legal right to the goods is transferred with the bill of lading, yet, in equity, the transfer takes effect only to the extent of the consideration paid by the transferee, leaving in the vendor an equitable interest in the surplus value (*i*). A. being indebted to B. on the balance of accounts, including bills of exchange still running, accepted by B. for A., consigned goods to B. on account of this balance. It was held, that A. was not entitled to stop the goods in transitu, upon B. becoming insolvent before the bills were paid; because, the goods being consigned to B. on account of the balance which then existed in B.'s favour, the property vested in B. absolutely (*k*). So if the purchaser of goods to be paid by bill, after giving his acceptance, during the time of credit, and while the goods are in transitu, sells them to a third person for a valuable consideration, without transferring any bill of lading to him, the right of the original vendor to stop the goods in transitu is taken away (*l*).

By the usage of trade, West India Dock warrants indorsed, *bonâ fide*, and for good consideration, have been held to transfer the property in the goods, like a bill of lading, and prevent the exercise of the right of stopping in transitu (*m*): but it may be questioned whether a document, similar in form to a bill of lading, but given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods (*n*). A., by contract, sold to B. a quantity of tallow then lying at a wharf, at so much per cwt.; and on the same day gave a written order upon the wharfinger to weigh, deliver, transfer, and re-house the same. B., having entered into a contract to sell tallow to C., obtained from the wharfingers, and gave to C. a written acknowledgment that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order: it was held, in an action of trover by C. against the wharfingers, that after their acknowledgment, they held the tallow as agents of C., and that they could not therefore set up as a defence a right in A. to stop it in transitu (*o*). But the delivery of a shipping note by the consignee of goods to a third person, with an order to the wharfinger to deliver the goods to such third person, does not pass the property in them so as to prevent a stoppage in transitu by the consignor (*p*). The lien of an

(*h*) *In re Westzinthus*, 5 B. & Ad. 817; 2 Nev. & M. 644.

(*i*) *Per Lord Langdale*, M. R., *Spalding v. Ruding*, 6 Beav. 376.

(*k*) *Vertue v. Jewel*, 4 Campb. 31.

(*l*) *Davis v. Reynolds*, 4 Campb. 267.

(*m*) *Zwinger v. Samuda*, Holt, N. P. C. 395, *per Park*, J.; but see the case in banc. 7 Taunt. 265; *McEwan v. Smith*, 2 H. L. Cas. 309; and *Lucas v. Dorrien*,

7 Taunt. 278.

(*n*) See *Bryans v. Nix*, 4 M. & W. 775.

(*o*) *Hawes v. Watson*, 2 B. & C. 540.

(*p*) *Akerman v. Humphrey*, 1 C. & P. 53, recognized by *Park*, J., delivering judgment in *Tucker v. Humphrey*, 4 Bingh. 522, 523. See *Jenkyns v. Usborne*, 7 M. & G. 700; 8 N. R. 505,

unpaid vendor (*q*) for the price of goods remaining in his own warehouse rent-free, is not divested by his giving the vendee a delivery order, under which part of the goods are removed. This was the case of pipes of wine at Liverpool.

A bill of lading remains in full force until there has been a complete delivery of the goods thereunder to a person having a right to receive them, and is not exhausted by the landing and warehousing them at a sufferance wharf (*r*).

See the "Factors Acts," 4 Geo. IV. c. 83; 6 Geo. IV. c. 49; 5 & 6 Vict. c. 39; & 24 & 25 Vict. c. 96, ss. 78, 79; and *Navulshaw v. Brownrigg*, 2 L. J., Chan. 57, 908; *Phillips v. Huth*, 6 M. & W. 605; *Hatfield v. Phillips*, 9 M. & W. 647; 14 M. & W. 665; and 12 Cl. & F. 343. *M'Ewan v. Smith*, 2 H. L. Ca. 309.

(*q*) *Townley v. Crump*, 5 Nev. & M. 606; 4 A. & E. 58. See also *Dixon v. Yates*, 5 B. & Ad. 341; *Miles v. Gorton*, 4 Tyrw. 295; *Gibson v. Carruthers*, 8 M.

& W. 321.

(*r*) *Meyerstein v. Barber*, L. R. 2, C. P. 38.

CHAPTER XXXVIII.

TRESPASS.

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I. *Where Trespass can be maintained.*

THE land of every owner or occupier is inclosed and set apart from that of his neighbour, either by a visible or tangible fence, as one field is separated from another by a hedge, wall, &c., or by an ideal, invisible boundary, existing only in the contemplation of law, as when the land of one man adjoins to that of another in the same open or common field. Hence every unwarrantable entry upon the land of another is termed a trespass by breaking his close. The form of action which the law has prescribed for this injury is an action of trespass *quare clausum fregit*, in which the plaintiff may recover a compensation in damages for the injury sustained.

Although the words of the writ are (or rather *were*, for it is not now necessary to mention the form of action in the writ) *quare "clausum" fregit*, yet it has been adjudged, in many instances where the plaintiff had not an interest in the soil, but an interest

in the profits only, that trespass might be maintained, and this form pursued (a). Hence, it was held, that the grantee or patentee of the king *de herbagio forestæ*, might maintain trespass against any person who consumed or destroyed the grass, and that the writ should be *quare clausum fregit* (b). So where the plaintiff is entitled to the vesture of land, that is, corn, grass, underwood (c), and the like. So where the plaintiff had an exclusive right of cutting turves in a moss; although the manor in which the moss was situate belonged to another (d). So if it be agreed between J. S. and the owner of the soil, that J. S. shall plough and sow the ground, and that in consideration thereof, J. S. shall give the owner of the soil half the crop, J. S. may maintain trespass for treading down the corn (e). So if a meadow be divided annually among certain persons by lot, then, after the several portion of each person is allotted, each is capable of maintaining an action of trespass *qu. cl. fr.*, for each has an exclusive interest for the time (f).

To maintain trespass it is essential that the plaintiff should have exclusive possession at the time of the injury committed. Hence "trespass will not lie for entering into a pew or seat in a church, because the plaintiff has not the exclusive possession, the possession of the church being in the parson." *Per Buller, J.* (g). The plaintiff agreed with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of defendant's. The grass was to be mowed, and made into hay, by the plaintiff; but the time at which the mowing was to begin was not fixed. Possession of the close was retained by the defendant. Before the plaintiff had done any act towards carrying the agreement into effect, the defendant refused to complete the agreement, and sold the grass to another person whom he directed to cut and carry away the same. Trespass *qu. cl. fr.* was brought, the declaration stating that the close was in the possession of the plaintiff. Lord *Ellenborough, C. J.*, said, that, as the plaintiff appeared to have been entitled, (if entitled at all under the agreement stated,) to the exclusive enjoyment of the crop growing on the land, during the proper period of its full growth, and until it was cut and

(a) In *Dent v. Oliver*, Cro. Jac. 122, it was held, in arrest of judgment, that trespass lay for the disturbance of the profits of a fair, by erecting a toll booth, without saying *clausum fregit*; and *per Cur.* "although it is not said *clausum fregit*, yet it is good enough, and punishable, as a trespass, for erecting a booth, although it be not any breach of the soil."

(b) *Dyer*, 285, b. pl. 4.

(c) 1 Inst. 4, b.; *Moor.* 355, pl. 483.

(d) *Wilson v. Mackreth*, 3 Burr. 1824.

(e) *Welsh v. Hall*, *per Powell, J.*, Bull.

N. P. 85. In such a case the owner is not jointly concerned in the growing corn, but is to have half after it is reaped, by way of rent, which may be of other things than money; although, in 1 Inst. 142, it is said, it cannot be of the profits themselves. But that, as it seems, must be understood of the natural profits.

Ibid.

(f) *Welden v. Bridgewater*, Cro. Eliz. 421.

(g) *Stocks v. Booth*, 1 T. R. 430. See *ante*, p. 1081.

carried away, he might, in respect of such exclusive right, maintain trespass against any person doing the acts complained of. But the court were of opinion, that as the agreement was by parol, it was competently discharged by parol while it remained executory, and that on this ground the plaintiff was not entitled to recover (*h*). But one tenant in common may maintain trespass against his cotenant, upon an actual ouster or destruction of the subject-matter of the tenancy, though he has not exclusive possession (*i*); as for grubbing up a hedge (*k*).

Where trees are excepted in a lease, the land on which they grow is necessarily excepted also; consequently, if the tenant cut down the trees, the landlord may maintain trespass for *breaking his close* and cutting down the trees (*l*). The property in bushes is in the tenant, even where they are cut down by a stranger (*m*). By an exception of "all trees, woods, coppice wood-grounds, of what kind or growth soever," apple trees are not excepted (*n*).

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*o*). The common user of a wall separating adjoining lands, belonging to different owners, is *primâ facie* evidence that the wall and the land on which it stands belong to the owners of adjoining lands in equal moieties as tenants in common (*p*). *Secus*, where the quantity of land, which each party contributes is known, and the wall built at the joint expense of the two (*q*). The rule about ditching is this: a person making a ditch, cannot cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs out, upon his own land, and often, if he likes it, he plants a hedge on the top of it; therefore, if he afterwards cut beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser: no rule about four feet, and eight feet, has anything to do with it. He may cut the thing as much wider as he will, if he enlarges it into his own land (*r*). If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted (*s*).

(*h*) *Crosby v. Wadsworth*, 6 East, 602.

(*i*) *Wilkinson v. Haygarth*, 13 Q. B. 837.

(*k*) *Voyce v. Voyce*, Gow, 201.

(*l*) *Rolls v. Rock*, Somerset Summ. Ass., 2 Geo. II., per Probyn, J., MS.

(*m*) *Berriman v. Peacock*, 9 Bingh. 884.

(*n*) *Wyndham v. Way*, 4 Taunt. 316.

(*o*) Per Bayley, J., in *Guy v. West*, Somerset Summ. Ass. 1808.

(*p*) *Cubitt v. Porter*, 8 B. & C. 257.

(*q*) *Matts v. Hawkins*, 5 Taunt. 20.

(*r*) Per Lawrence, J., in *Vowles v. Miller*, 3 Taunt. 138. Per Holroyd, J., *Doe v. Pearsey*, 7 B. & C. 307, acc.

(*s*) *Holder v. Coates*, 1 M. & M. 112.

The rule, that waste land near a highway, and the soil to the middle of the highway, is to be presumed *prima facie* to belong to the owner of the land next adjoining (*t*), is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a copyholder (*u*); but evidence may be given to rebut the presumption (*x*). No such presumption arises, where roads are set out under an Inclosure Act, and the herbage on the side vests in the proprietors of the adjoining lands respectively, under the provisions of the statute (*y*). So where the lord of a manor has conveyed land to A. and afterwards to B., and it appears that a narrow strip passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A., from the fact that the strip lies between a highway and land undoubtedly comprised in the conveyance to A. (*z*). If the owner of land builds houses and marks out a street, and assigns part of the land as a public highway; this will not be considered as a transfer of the absolute property in the soil, so as to prevent the owner from maintaining trespass for an injury to the soil, *e. g.*, for placing the end of a bridge thereon (*a*).

The action of trespass *qu. cl. fr.* is a local action (*b*). Hence, where trespass was brought in a court in England for entering the plaintiff's house in Canada; it was held, that the action could not be maintained (*c*); *Buller, J.*, observing, "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions; it is sufficient for the courts, that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here, which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

The action of trespass *qu. cl. fr.* is termed a possessory action, to distinguish it from those actions in which the plaintiff must show a title. Being founded on injury to the possession, it is essential that the plaintiff should be in the actual possession of the close at the time when the injury is committed; but, as against a stranger or wrong-doer, it is immaterial whether such possession be founded on a good title or not (*d*). Even a tortious possession will support trespass against a wrong-doer (*e*). In like manner it was held, that the plaintiff, in possession of glebe land under a

(*t*) See *Grose v. West*, 7 Taunt. 39. To "balks," *i. e.*, strips of uncultivated land lying between lands which are private property, the rule does not, it seems, apply. *Godmanchester v. Phillips*, 4 A. & E. 550.

(*u*) *Doe v. Pearsey*, *supra*. See *Doe v. Kemp*, 2 B. N. C. 102.

(*x*) *Doe v. Hampson*, 4 C. B. 267.

(*y*) *R. v. Hatfield*, 4 A. & E. 164. *Per Lord Denman, C. J.*, *R. v. Edmonton*, 1

M. & Rob. 24, *acc.*

(*z*) *White v. Hill*, 6 Q. B. 487.

(*a*) *Lade v. Shepherd*, 2 Str. 1004.

(*b*) See *ante*, p. 453.

(*c*) *Doulson v. Matthews*, 4 T. R. 503.

(*d*) See *per Patteson, J.*, *Ryan v. Clark*, 14 Q. B. 71; *Newlands v. Holmes*, 3 Q. B. 679; *Every v. Smith*, 26 L. J., Ex. 344.

(*e*) *Cary v. Holt*, 2 Str. 1238.

lease, void by 13 Eliz. c. 20 by reason of the rector's non-residence, might maintain trespass against a wrong-doer (*f*). By induction the parson is put into possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it (*g*). The contractors for making a navigable canal who had, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong-doer (*h*). Where the plaintiff paid a nominal rent to the crown for 1000 acres of woodland, the wood being all reserved to the crown; and the only use the plaintiff himself made of the land was, by exercising the privilege of shooting the game; and it appeared that a person, by leave from him, cut and took away the grass from the sides: it was held, that, although he took no legal estate from the crown, for want of compliance with the 1 Ann. c. 7, s. 5, and could not therefore have maintained ejectment, nor even have retained possession as against the crown, yet that he might maintain trespass against a party having no title, and a wrong-doer. It was held also, that payment of the rent, the exercise of the privilege of shooting over the land, and the cutting of the grass by the plaintiff's permission, was sufficient evidence to go to a jury, and for them to find that he was in the actual possession of all but the trees (*i*). It seems that the plaintiff could not have been treated by the crown as an intruder. *S. C.*

If a man be disseised, after his re-entry, he may have an action of trespass against the disseisor for any trespass done by him after the disseisin; for by his re-entry his possession is restored *ab initio* (*k*). The customary heir of a copyholder may maintain the action, after entry, for trespasses committed by a wrong-doer before, for after entry the title relates back (*l*). If he who has the right to land enters, he thereby acquires the lawful possession, and may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land (*m*); and a lessor, having entered at the expiration of the term, may sue in trespass persons claiming under the late tenant as well as the late tenant himself (*n*). It is not necessary that the party who makes the entry should declare that he enters to take possession: it is sufficient, if he does any act to show his intention (*o*). So, *e converso*, if a tenant be out of actual possession of

(*f*) *Graham v. Peat*, 1 East, 244.

(*g*) *Bulwer v. Bulwer*, 2 B. & Ald. 470.

(*h*) *Dyson v. Collick*, 5 B. & Ald. 600.

(*i*) *Harper v. Charlesworth*, 4 B. & C. 574.

(*k*) 2 Roll. Abr. 554, pl. 5.

(*l*) *Barnett v. Earl of Guilford*, 11 Ex. 19.

(*m*) *Butcher v. Butcher*, 7 B. & C. 399; and *semble*, also, for the *previous* trespasses, on the doctrine of relation; *Barnett v. Earl of Guilford*, 11 Ex. 19; at all events, against the original wrong-doer. *S. C.*

(*n*) *Hey v. Moorhouse*, 6 B. N. C. 52.

(*o*) *Butcher v. Butcher*, 7 B. & C. 399.

the land demised, by reason of a flood, at the time his interest ceases, he cannot maintain trespass, even against a wrong-doer, unless a clear intention to continue in possession be shown, for on the cesser of the interest the cesser of possession is to be presumed (*p*).

In trespass for taking and carrying away *goods*, however, it is not essentially necessary that the plaintiff should, at the time when the act was done which constitutes the trespass, have the actual possession of the thing which is the subject-matter of the trespass: it is sufficient, if he has a constructive possession in respect of the right being actually vested in him. Hence, if a lord be entitled to a waif and estray, within his manor, he may, before seizure, maintain trespass against a stranger who shall take away the waif or estray (*q*); for the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord. So an executor has a right immediately on the death of the testator, and this right draws after it a constructive possession from the time of the death of the testator (*r*). If a man gives me goods, which are at York, and before I have possession a stranger take them, yet I shall have trespass; because by the gift the property is in me, to which the law annexes possession (*s*). But it seems that the gift must be by deed or instrument of gift (*t*). So the mortgagee, by deed, of goods may maintain trespass, although the mortgagor retain possession under the provisions of the deed (*u*). The owner of a piece of land granted liberty to A. and his heirs to build a bridge on his land, and A. covenanted to build a bridge for public use, to keep it in repair, and not to demand toll. The bridge was built by A. of materials purchased at his expense: part of the materials of the bridge having been taken away by a wrong-doer; it was held, that the public had only a license to make use of the materials while they formed part of the bridge for the purpose of passage; and when they ceased to be part of the bridge, A.'s original property in them reverted to him, discharged of the right of user by the public, and consequently that A. might maintain trespass for the *asportavit* against the wrong-doer (*x*).

By the common law, he that agrees to a trespass after it is done, is no trespasser, unless the trespass be done to his use or for his benefit, and then his agreement subsequent amounts to a command; for, in this case, *omnis ratihabitio retrotrahitur et mandato æquiparatur* (*y*). But it is otherwise, if the trespass be not

(*p*) *Brown v. Nolley*, 3 Ex. 219.

(*q*) F. N. B. 91, b.

(*r*) *Fisher v. Young*, 2 Bulstr. 268.

(*s*) Bro. Abr. Trespass, pl. 303.

(*t*) *Irons v. Smallpiece*, 2 B. & Ald. 551; *Shower v. Pilck*, 4 Ex. 478; but see Com. Dig. Biens, D. 2; *Shepherd's Touchstone*, 232. In *Flory v. Denny*, 7

Ex. 581, it was held, that a mortgage of a personal chattel, without either deed or delivery, was sufficient to pass the property.

(*u*) *White v. Morris*, 11 C. B. 1015.

(*x*) *Harrison v. Parker*, 6 East, 154.

(*y*) 4 Inst. 317; *Eastern Counties Railway v. Broom*, 6 Ex. 314, acc.

done to his use. A. having knowingly received from B. a chattel, (which B. had wrongfully seized,) upon demand refused to give it back to the owner; there was not any proof that the seizure was to A.'s use; it was held, that A. was not a joint trespasser with B. (z). That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act, if done by his previous authority (a). Where a broker, under an authority to distrain for rent, took and sold a fixture, and paid over the proceeds to the landlord (the defendant), who received them without inquiry but without knowledge that anything irregular had been done, it was held, that no such authority appeared as would sustain the action (b).

Although every person has of common right a liberty of coming into a public market for the purpose of buying and selling, yet he has not of common right a liberty of placing a stall there, but he must acquire such liberty by a compensation, which is called stallage. Hence, trespass may be maintained by the owner of the soil against a person who unlawfully places a stall in the market (c). The authority of the preceding case was recognized in the *Mayor of Norwich v. Swann*, 2 W. Bl. 1116; where it was held, that trespass would lie for setting tables in a market-place for the sale of goods without leave of the owner of the soil. The lord or owner of the soil may maintain trespass against a commoner who is guilty of an entry on the common, for the purpose of chasing the conies there: for the commoner can justify an entry merely for the purpose of using his common (d).

Tenants in common ought to join in trespass *quare clausum fregit*; for if one tenant in common bring trespass *qu. cl. fr.* without his companion, it may be pleaded in abatement; but in abatement only (e).

An action of trespass lies against any person who gleans on another's ground after harvest; for a right to glean cannot be claimed by any person at common law. Neither have the *poor* of a parish *legally settled* such right (f). Trespass will lie against a peace-officer who seizes, under a search-warrant, goods not specified therein (g). Though the freehold of the churchyard is the parson's,

(z) *Wilson v. Barker*, 4 B. & Ad. 614.

(a) *Per Tindal*, C. J., delivering judgment in *Wilson v. Tummam*, 6 M. & G. 242.

(b) *Freeman v. Rosher*, 13 Q. B. 780.

(c) *Mayor of Northampton v. Ward*, 2

Str. 1238; 1 Wils. 107.

(d) *Hadesden v. Gryssell*, Cro. Jac. 195.

(e) Com. Dig. Abatement (E. 10).

(f) *Steel v. Houghton*, 1 H. Bl. 51.

(g) *Crozier v. Cundley*, 6 B. & C. 232.

trespass lies at the suit of a person at whose expense a tombstone has been erected, against a person who wrongfully removes it from the churchyard and erases the inscription (*h*). It is a direct trespass to injure the person of another, by driving a carriage against the carriage wherein such person is sitting, although the last-mentioned carriage be not the property nor in the possession of the person injured (*i*).

A person, who for his own purposes, brings on his lands, or collects and keeps there anything likely to do mischief if it escapes, no matter whether the thing brought be beasts, or water, or filth, must keep it in *at his peril*; and if he does not do so, he is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God (*k*). "If I am the owner of an animal, in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." *Per Williams, J.* (*l*). For the vicious acts of an animal of an ordinarily quiet nature, the owner is generally not liable, unless he has a knowledge of its mischievous propensities, but when such vicious acts are really the natural consequences of the animal's being loose, the owner is responsible (*m*). Trespass to the person or personal property, upon a highway, however, will not render the trespasser liable, without negligence. As in the case of collisions of ships at sea, or accidents caused by driving or riding along the highway, in all which cases, without negligence, there is no liability, whether on sea or land (*n*). It was said by *Blackburn, J.*, in *Fletcher v. Rylands*, that it is believed that all the cases in which inevitable accident has been held an excuse for what *primâ facie* was a trespass, can be explained on the principle that the circumstances were such, as to show that the plaintiff had taken that risk upon himself.

Although, if a person does an injury by an unavoidable accident, an action does not lie (*o*); yet if any blame attaches to him, although he be innocent of any intention to injure, as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse, then trespass may be maintained (*p*).

(*h*) *Spooner v. Brewster*, 3 Bingh. 136.

(*i*) *Hopper v. Reeve*, 7 Taunt. 698.

(*k*) *Fletcher v. Rylands*, L. R., 1 Ex. 279 (in error); L. R., 3 H. L. Cas. 330; 37 L. J., Ex. 161; 4 H. & C. 250.

(*l*) *Cox v. Burbridge*, 13 C. B. (N. S.) 438; 32 L. J., C. P. 89. See *Lee v. Riley*, 18 C. B. (N. S.) 722; *sed quare*

as to last case.

(*m*) *May v. Burdett*, 9 Q. B. 112.

(*n*) *Fletcher v. Rylands*, see note (*k*); *Hammack v. White*, 11 C. B. (N. S.) 588; 31 L. J., C. P. 129.

(*o*) *Hall v. Fearnley*, 3 Q. B. 919.

(*p*) *Wakeman v. Robinson*, 1 Bingh. 213. See further, *ante*, p. 43.

Trespass will lie against a corporation aggregate, for an act done by their agent within the scope of his authority (*q*). See *ante*, p. 43.

By 21 Jac. I. c. 16, s. 3, all actions of trespass *quare clausum fregit* shall be commenced and sued within six years next after the cause of such actions accrued.

II. Where Trespass cannot be maintained.

If the entry be warranted by law, it is not a trespass. Such is an entry to demand rent due for the enjoyment of the land, to take and carry off tithes after they have been set forth, or to distrain for rent arrear or damage feasant. It was formerly held, that a person might justify the following a fox with hounds over the grounds of another, if there were not any further damage committed than was absolutely necessary for the killing the fox (*r*); but the law now is, that a person may not enter the grounds of another merely for the sport and diversion of the chase (*s*). Where a person goes out sporting with his friends, and purposely leads them on to another's land, he is equally guilty of a trespass, although he may remain off the land, whilst his friends go on it (*t*). But in *Mason v. Keeling*, Lord Raym. 608, *Holt*, C. J., said, that if a dog breaks a neighbour's close, the owner will not be subject to an action. One tenant in common cannot bring an action of trespass against his co-tenant (except on an actual ouster or destruction of the subject-matter of the tenancy), because each of them may enter and occupy in common, &c., *per my et per tout*, the lands and tenements which they hold in common (*u*). So if, from the finding of the jury, it appears to be a tenancy in common, judgment shall be given for defendant, although the issue be found against him (*v*). Bargainee for years cannot maintain trespass before entry and actual possession (*x*).

If A. make a lease for years, excepting the trees, with an intention to sell them, the law gives the lessor power, as incident to the exception, to enter and show the trees to those who would buy them, for without sight none would buy, and without

(*q*) *Marund v. Monmouthshire Canal Co.*, 4 M. & G. 452.

(*r*) *Gundry v. Feltham*, 1 T. R. 334.

(*s*) *Earl of Essex v. Capel*, Hertford Sum. Ass. 1809, Lord *Ellenborough*, C. J., 2 Chitty, Game, 1831. And see the remarks there of the C. J. on *Gundry v. Feltham*.

(*t*) *Hill v. Walker*, Peake's Add. Ca. 234. See *Stacey v. Whitehurst*, 18 C. B.

(N. S.) 344; 34 L. J., 163 Q. B.

(*u*) Litt. Sect. 323.

(*v*) *Benington v. Benington*, Cro. Eliz. 157. But this was a special verdict. A tenancy in common cannot be given in evidence under *lib. ten.* *Voyce v. Voyce*, Gow, 201; and see *Farrar v. Beswick*, 1 M. & W. 682.

(*x*) Adm. *Lutwich v. Mitton*, Cro. Jac. 604; *Wheeler v. Montefiore*, 2 Q. B. 133.

entry none could see (*y*). A lessor, during the term, cut down some oak pollards growing upon the demised premises which were unfit for timber; it was held, that, as a tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them; and consequently that he or his vendee could not maintain trespass against the tenant for taking them (*z*). The plaintiff was the landlord of a house, which he let to A., ready furnished, and the lease contained a schedule of the furniture. An execution issued against A., under which defendant, as sheriff seized part of the furniture, although notice was given to the officer that it was the property of plaintiff. Plaintiff brought trespass. Adjudged *per Cur.*, that it would not lie (*a*). The defendant locked up the goods of plaintiff, his lodger; in a room which he held of the defendant, and in which the plaintiff had put them; the defendant kept the key, and refused the plaintiff access to them, saying that nothing should be removed, till a sum of money which he claimed to be due from the plaintiff was paid. This was held not such a taking of the goods as would support an action of trespass (*b*). *Trespass* will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after the provisional assignment, and notice from the provisional assignee not to sell; for, at the time the goods were taken, the assignees had neither actual nor constructive possession (*c*).

Condemnation of goods in the Exchequer is so conclusive and so alters the property, that trespass will not lie against the officer for seizing the goods condemned; for the condemnation has relation to the time of seizure, at which time the goods were the goods of the king, and not of the plaintiff (*d*). So where a ship was seized as forfeited under the Navigation Act, 12 Car. II. c. 18 (*e*), by a governor of a foreign country belonging to Great Britain; it was held, that the owner could not maintain trespass against the party seizing, although the latter did not proceed to condemnation; for by the forfeiture the property is divested out of the owner (*f*). So where a ship is *bond fide* seized as a prize, the owner cannot sustain an action in a court of common law for the seizure, though she be released without any suit being instituted

(*y*) *Liford's case*, last res. 11 Rep. 52, a.; *Hewitt v. Isham*, 7 Ex. 77.

(*z*) *Channon v. Patch*, 5 B. & C. 897.

(*a*) *Ward v. Macaulley*, 4 T. R. 489. See *Gordon v. Harper*, 7 T. R. 9.

(*b*) *Hartley v. Moxam*, 3 Q. B. 701.

(*c*) *Smith v. Milles*, 1 T. R. 475.

(*d*) *Scott v. Shearman*, 2 W. Bl. 977.

(*e*) Repealed.

(*f*) *Wilkins v. Despard*, 5 T. R. 112.

against her; his remedy, if any, being in the Court of Admiralty (*g*).

Trespass cannot be maintained for taking an excessive distress, where the distress is lawful, the whole being one entire act (*h*). Neither will trespass lie for an irregular distress, where the irregularity complained of is not in itself an act of trespass, but consists merely in the omission of some of the forms required in conducting the distress, such as not procuring goods to be appraised before they are sold (*i*). If a sheriff continues in possession after the return day of the writ, that irregularity makes him a trespasser *ab initio*, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution (*j*); and *per Mansfield, C. J.*, "the plaintiff should have new assigned."

Trespass will not lie against an officer for taking goods or cattle by virtue of a replevin, unless a claim of property be made at the time when the officer comes to demand them (*k*). Trespass will not lie against a coroner for causing a person to be put out of the room where an inquest was about to be held, after his refusal to depart, for the coroner's court is a court of record, and no action will lie against a judge of a court of record for any act done by him in the exercise of his judicial functions (*l*). If a person rated to the poor object to a rate valid on the face of it, *e. g.* because it is a prospective rate, he ought to appeal to the next session; and if he do not, he cannot maintain trespass against the overseers of the poor who distrain on him for non-payment of the rate (*m*). But where the magistrates or other persons have acted without jurisdiction, as where the person rated has no land in the parish for which the rate is made, it is otherwise (*n*); *a fortiori*, therefore, if the want of jurisdiction appears on the face of the warrant or order (*o*). The house of the plaintiff, an uncertificated bankrupt, was broken open, and effects acquired by him, subsequently to his bankruptcy, were taken by the defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The bankrupt having sued the defendants in trespass, they obtained, after action brought, a surrender of the assignees' interest in the effects seized: it was held that this was a ratification of the seizure, and that the plaintiff could not recover (*p*). Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third party, had left the bankrupt's furniture, &c., in his possession, and afterwards, notwithstanding such agreement, seized

(*g*) *Faith v. Pearson*, 4 Campb. 357.

(*h*) *Lynne v. Moody*, 2 Str. 851.

(*i*) *Messing v. Kemble*, 3 Campb. 115.

See further, *ante*, p. 610.

(*j*) *Aitkenhead v. Blades*, 5 Taunt. 198.

(*k*) *Per Holt, C. J.*, in *Hallett v. Byrt*,

Carth. 381.

(*l*) *Garnett v. Ferrand*, 6 B. & C. 611.

(*m*) *Durrant v. Boys*, 6 T. R. 580.

(*n*) *Weaver v. Price*, 3 B. & Ad. 409.

See *ante*, p. 1142.

(*o*) *Day v. King*, 5 A. & E. 359.

(*p*) *Hull v. Pickersgill*, 1 B. & B. 282.

the same ; it was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees (q).

III. *Of the Declaration.*

Venue.—The action of trespass *qu. cl. fr.* is a local action, and consequently the venue must be laid in the county where the land lies ; for otherwise the plaintiff, on the general issue, may be nonsuited at the trial, unless advantage be taken of the 3 & 4 Will. IV. c. 42, s. 22 (see *ante*, p. 454), under which local actions may be tried and writs of inquiry executed in any county, if the court or judge shall so order. But trespass for taking goods is transitory, and the venue may be laid in any county ; subject, however, to its being changed upon an application to the court, supported by affidavit, &c.

Form of.—The form of declaration given in Sched. B. Form 25, to the Common Law Procedure Act, 1852, is, “that the defendant broke and entered certain land of the plaintiff, called the Big Field, and depastured the same with cattle.” Where, however, several trespasses have been committed, some of which are justifiable and others not, it would be advisable to declare in the old form, that the defendant, “*diversis diebus et vicibus*,” committed the trespasses, &c., for if a justification were pleaded to a declaration in the form given by the Common Law Procedure Act, a new assignment would not, perhaps, be admissible (r), for that would be enlarging the declaration (s). By 18 Pl. R., H. T. 1853—“In actions for trespass to land, the close or place in which, &c., must be designated in the declaration by name, or abutments, or other description, in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the court or a judge may think reasonable.” An insufficient description may also, it seems, be ground for a new trial (t). The above form, it will be observed, describes the close by name—“the close called ‘the Big Field.’” A description of a close by two abutments only is sufficient (u). At common law it was not necessary to describe the close (v) ; and the plea of *liberum tenementum* was originally invented for the purpose of obtaining a better description of the property (x).

(q) *Nias v. Adamson*, 3 B. & Ald. 225.

(r) *Taylor v. Smith*, *post*, p. 1257.

(s) *Per Cur.*, *Polkinghorn v. Wright*, 8 Q. B. 206.

(t) *Webber v. Richards*, 1 Q. B. 439.

As to a description of a party wall, see *Murley v. M'Dermott*, 8 A. & E. 138.

(u) *North v. Ingamells*, 9 M. & W. 249.

(v) *Martin v. Kesterton*, 2 W. Bl. 1089.

(x) *Harvey v. Brydges*, 14 M. & W. 437.

The close in which, &c., does not mean the whole close referred to in the declaration, but that part of the close in which the trespass is proved to have happened; and the plaintiff (*y*) or defendant (*z*) may so apply it. Where the plaintiff had named the close in his declaration, and the defendant pleaded *lib. ten.* generally, without giving any further description of the close; it was held that the plaintiff was not driven to a new assignment, but was entitled to recover upon proving a trespass done in a close bearing the name given in the declaration, although the defendant had a close in the same parish known by the same name (*a*). So where the close was insufficiently described by abutments, it being described as abutting "towards" instead of abutting "upon" certain other closes, but the defendant went to trial without objection; it was held, that the plaintiff was entitled to a verdict on proving a trespass in a close corresponding to the one so described, though it appeared that the defendant was also entitled to one, to which the description was applicable (*b*).

In trespass for taking goods, the goods may be described generally, as in trover (*c*). The declaration should state the goods to be "the plaintiff's," or he will not be entitled to any damages for them (*d*); unless there be an admission of the plaintiff's property in them on the record, as where, in trespass for taking a hook, the defendant pleaded, that the plaintiff attacked him with it, wherefore the defendant took it away from him and handed it to the constable (*e*). In declarations for taking animals *feræ naturæ*, it must be stated that the animals were either dead, tame, or confined; otherwise property in the plaintiff cannot be alleged; at least such allegations will be bad on demurrer. In trespass for taking *duas damas ipsius* plaintiff, in a certain close of the plaintiff, called the park; the declaration was held bad on demurrer, because a person cannot have property in deer unless they are tame and reclaimed (*f*). The value of fixtures may be recovered under the terms, "goods, chattels, and effects," in a declaration in trespass (*g*).

(*y*) *Tapley v. Wainwright*, 5 B. & Ad. 395.

(*z*) *Richards v. Peake*, 2 B. & C. 918; *Bassett v. Mitchell*, 2 B. & Ad. 99. See post, p. 1257.

(*a*) *Cocker v. Crompton*, 1 B. & C. 489.

(*b*) *Lempriere v. Humphrey*, 3 A. & E. 181.

(*c*) 2 Wms. Saund. 74, *in notis*.

(*d*) *Pritchard v. Long*, 9 M. & W. 666.

(*e*) *Brooke v. Brooke*, 1 Sid. 184.

(*f*) *Mallocke v. Eastley*, 3 Lev. 227. The rule is the same in indictments for larceny. *Rough's case*, 2 East, P. C. 607.

(*g*) *Pitt v. Shew*, 4 B. & Ald. 206; (see *Dalton v. Whitem*, 3 Q. B. 961); *i. e.*, *semble*, if severed, *per Parke*, B., in *Hallen v. Runder*, 1 C. M. & R. 276; but see *per Parke*, B., *Twigg v. Potts*, *ibid.* 93.

IV. *Of the Pleadings.**Not Guilty.*

The general issue in this action is, *not guilty*. By 19 Pl. R., H. T. 1853—In actions for trespass to land, the plea of *not guilty* shall operate as a denial, that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially. By R. 20—In actions for *taking, damaging*, or converting the plaintiff's goods, the plea of *not guilty* shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein. And see *post*, "Not Possessed."

By Statute.—Under a plea of *not guilty* "by statute" (see *ante* p. 861) an overseer sued in trespass for taking A.'s goods, may prove that he, as overseer, distrained the goods for a poor's rate due from B., and that the goods were the goods of B., and not of A. (*h*). Wherever a statute says that a party may prove his defence under the general issue, it means that he may prove the whole matter of defence (*i*). Such a plea is not affected by the Pleading Rules of H. T. 1853, but has the same operation as it would have had they not been made; putting in issue not only the defences peculiar to the statute, but all that would have arisen at common law (*k*).

By 11 Geo. II. c. 19, s. 21,—In actions of trespass brought against any person entitled to rents or services of any kind, his bailiff or receiver, or other person, relating to an *entry* by virtue of the act, or otherwise, *upon the premises* chargeable with such rents, or services, or to *any distress*, or seizure, sale, or disposal of any goods or chattels *thereupon*, the defendants may plead the general issue, and give the special matter in evidence. Thus the tenancy and ownership of the goods are denied by the general issue in such a case (*l*). So the defendant may show that he entered under a warrant of distress for rent and was forcibly turned out of possession, and thereupon broke the door and entered, in order to seize the goods (*m*). But where the tenant had removed his goods clandestinely from the demised premises, and the landlord had seized them as a distress within thirty days, under the above statute; it was held, that to an action of trespass brought by the tenant against the landlord for such seizure, the defendant could not give the special matter in evidence under the general issue by virtue of the above section; for that clause is confined to cases

(*h*) *Haine v. Davey*, 4 A. & E. 892.

(*i*) *Per Patteson, J.*, S. C.

(*k*) *Ross v. Clifton*, 11 A. & E. 631.

(*l*) *Williams v. Jones*, 11 Q. B. 643.

(*m*) *Eagleton v. Gutteridge*, 11 M. & W. 465.

where the distress is made *upon* the premises demised (*n*). In this case, the defence must be pleaded specially (*o*).

Not Possessed.

To a declaration for breaking and entering defendant's close, the defendant pleaded (*inter alia*), that the close was not the plaintiff's; it was held, that evidence of possession (unrebutted) was sufficient to entitle the plaintiff to a verdict on this plea (*p*). "The plea denying the close to be the plaintiff's is a denial of the possession, if the defendant is a wrongdoer (*q*), if otherwise, of the right to possession, but in either supposition it is necessarily a denial of *title*, for even in the former case possession is title as against a wrong-doer" (*r*). Such a plea, in the case of *goods*, was always held to put in issue the *property* of the plaintiff in the goods, which could not otherwise be denied, there being no plea of *liberum tenementum* in such a case (*s*). In the case of trespass to *land*, where a plea of *lib. ten.* may be pleaded, the court of Queen's Bench, in *Whittington v. Boxall*, 5 Q. B. 139, differing from the above dictum in *Purnell v. Young*, held, that the defendant, under a plea of "not possessed," could not give evidence of title in himself. But this question has been finally set at rest by *Jones v. Chapman*, 2 Exch. 803, where it was held, in the Exchequer Chamber, that under such a plea the defendant might show a lawful *right* to the possession of the close, either in himself or in some other person, under whose authority he had acted.

Liberum Tenementum.

In trespass to real property, the defendant may plead that the close in which, &c., is the freehold or customary tenement of the defendant, or of a third person under whom he acted (*t*). This is termed a plea of *liberum tenementum*.

By this plea the defendant admits that the plaintiff is in possession, and that he himself is *prima facie* a wrong-doer; but he undertakes to show a title in himself which shall do away with the presumption arising from the plaintiff's possession. This he is bound to do, either by showing title by deed, in the usual way, or by proving a possessory title for twenty years. Hence, this plea is not supported by proof of the exercise of acts of ownership by the defendant for a period of less than twenty years, where it appears that before the commencement of that period, and also within twenty years, the estate was in a third person (*u*). On a plea of

(*n*) *Vaughan v. Davis*, 1 Esp. 257.

(*o*) *Postman v. Harrell*, 6 C. & P. 225.

(*p*) *Heath v. Milward*, 2 B. N. C. 98.

Secus (semble), in an action of trespass for mesne profits. *Doe v. Huddart*, 2 C. M. & R. 316.

(*q*) *Acc. per Patteson, J., Carnaby v.*

Welby, 8 A. & E. 878.

(*r*) *Per Parke, B., Purnell v. Young*, 3 M. & W. 288.

(*s*) *Harrison v. Dixon*, 12 M. & W. 142.

(*t*) *Harvey v. Bridges*, 1 Ex. 261.

(*u*) *Brest v. Lever*, 7 M. & W. 593.

liberum tenementum, to an action of trespass on a close named or described in the declaration, the defendant is entitled to a verdict, if he establish a title to that part of the close on which the trespass was committed, and is not bound to prove a title to the whole close. By this plea he undertakes to prove; first, that some part of the described close belongs to him; and, secondly, that it is on this part of the close that all the acts complained of have been done (*v*).

Where the defendant pleads *lib. ten.* in I. S., and that the defendant entered by his command, the plaintiff, in his replication, may traverse the command; for it is a settled rule, that possession is sufficient to maintain trespass against a wrong-doer, and this rule would be of no avail if the command were not traversable; for in that case the wrong-doer might shelter himself under a plea of an outstanding freehold in a stranger, from whom he derived no authority to commit the trespass; and it is not competent to a wrong-doer to call on a person in actual possession to set out his title (*x*). The plaintiff had lands abutting on one side of a public highway, called Shepherd's Lane, (which was *prima facie* evidence that half of the lane was his soil and freehold); it was held, that he might declare generally for a trespass in his close, called Shepherd's Lane, and that it was incumbent on the defendant to plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass in that part of the lane which was his exclusive property (*y*).

Where the plaintiff, in his declaration, avers a single act of trespass, *e. g.* that on such a day the defendant stopped the plaintiff's cattle and cart, and the defendant justifies the act, there cannot be a new assignment (*z*).

Where one tenant in common, brings trespass against his co-tenant, the declaration alleging a destruction of and expulsion from the entire common property, the defendant may pay money into court, in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, or traverse the plaintiff's property (*a*).

A plea of *lib. ten.* is a sufficient answer to an action of breaking and entering the plaintiff's dwelling-house, expelling the plaintiff therefrom, and seizing and taking the plaintiff's goods for the purpose of removing them from the premises (*b*).

(*v*) *Smith v. Royston*, 8 M. & W. 381. See *ante*, p. 1254.

(*x*) *Chambers v. Donaldson*, 11 East, 65.

(*y*) *Stevens v. Whistler*, 11 East, 51.

(*z*) *Taylor v. Smith*, 7 Taunt. 156. But since the Com. Law Proc. Act, 1852,

the declaration is, in form, quite general, not mentioning any day (see *ante*, p. 1253). Perhaps, therefore, this case is no longer applicable.

(*a*) *Cresswell v. Hedges*, 1 H. & C. 421; 31 L. J., Ex. 497.

(*b*) *Meriton v. Coombes*, 9 C. B. 787.

It was at one time held, that where a tenant remains in possession after the expiration of his term, the landlord is not justified in expelling him by force in order to regain possession (c); but it seems now to be settled, that in trespass "it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed;" *per Parke, B. (d)*. And the same principle is applicable to the retaking of chattels (e).

Although, as a general rule, where a house has been unlawfully erected on a common, a commoner may pull it down, yet he is not justified in doing so if there are persons actually in it at the time (f). But a plea of *liberum tenementum* is an answer in trespass for pulling down a dwelling-house, even although actually occupied by plaintiff at the time of the alleged trespass, if such occupation was wrongful (g).

Accord and Satisfaction.

Accord *and* satisfaction, being a good plea in all actions where damages only are to be recovered, is consequently a good plea in trespass (h); but a plea of accord, without satisfaction, cannot be supported. Hence, in trespass for taking cattle, it cannot be pleaded, that it was agreed "that plaintiff should have his cattle again;" for this is no satisfaction for the injury done (i).[§] So where to trespass for breaking and entering the plaintiff's close, the defendant pleaded, that the plaintiff and he agreed to settle all matters in dispute, including the present action, and to bind themselves in a penalty not to sue one another, the plea was held bad (j).

Estoppel.

If, in an action of trespass, a verdict be found on any fact or title distinctly put in issue, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title. To an action of trespass for digging and getting coals out of a coal mine, alleged by the plaintiff to be under his close called the Cow Close; the defendants, husband and wife, pleaded, deducing title, in right of the wife, from one Sir J. Z. to certain bargainees; and from them to the defendant, the wife. To this plea the plaintiff replied, by way of estoppel, a former verdict obtained by him in an action of trespass

(c) *Newton v. Harland*, 1 M. & G. 644.

(d) *Harvey v. Brydges*, 14 M. & W. 442, cited in judgment in *Blades v. Higgs*, 10 C. B. (N. S.) 721.

(e) *Blades v. Higgs*, 10 C. B. (N. S.) 721.

(f) *Perry v. Fitzhove*, 8 Q. B. 755;

Jones v. Jones, 1 H. & C. 1.

(g) *Burling v. Read*, 11 Q. B. 757.

(h) 9 Rep. 78, a.

(i) 1 Roll. Abr. 128 (A.) pl. 7.

(j) *James v. David*, 5 T. R. 141. See further, as to accord and satisfaction, *ante*, p. 147.

against the wife, she being then sole, in which the question was, whether the coal-mines mentioned in the now declaration were parcel of what passed under the bargain and sale from Sir J. Z. to the persons under whom the wife claimed which issue had been found for the plaintiff, and against the wife. It was held, that the defendants were estopped by this verdict, and judgment thereupon, from averring in the present action, (contrary to the title found against the wife in the previous action), that the coal-mines now in question passed under the said bargain and sale; and consequently, that the plaintiff ought to recover (*k*). But since the case of *Vooght v. Winch*, 2 B. & Ald. 662, the judgment will not be conclusive as an estoppel, unless it be so pleaded.

Where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital; and a recital in an instrument, not under seal, may be such as to be conclusive to the same extent. But a party to an instrument is not estopped, in an action by another party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made is receivable, to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish (*l*). When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all, but when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument (*m*). But such recital must be pleaded (*n*).

Licence (o).

To an action of trespass, the defendant may plead, that he committed the supposed trespass by leave of the plaintiff. Where a person is licensed to do an act, it is necessarily implied, that he may do every thing without which that act cannot be done. Hence, where to trespass against A., B. and C., for breaking and entering plaintiff's house and continuing there ten days, and selling divers goods; the defendants pleaded, that the plaintiff licensed A. to enter the house, and to continue therein for the sale of his goods; by virtue of which license, A. in his own right, and B. and C. as his servants, peaceably entered the house by the door, then open, to sell the said goods, and in and about the sale of goods *necessarily*

(*k*) *Outram v. Morewood*, 3 East, 346.

(*l*) *Carpenter v. Buller*, 8 M. & W.

209.

(*m*) *Per Patteson, J., Stroughill v.*

Buck, 14 Q. B. 787.

(*n*) *Young v. Raincock*, 7 C. B. 310.

(*o*) As to a license being revocable or not; see *ante*, p. 1086.

continued in the house for ten days. On demurrer, it was objected, that the license was personal to A., and consequently, could not justify the entrance of any other person; and at least it ought to have appeared on the face of the plea, that the entry of the other defendants was necessary for the purposes mentioned in the license. But the court overruled the objection, *Willes, C. J.*, observing, that unless a man could sell goods to himself, it was absurd to contend that this was a license to A. only to go into the house; besides, it was highly probable, that he might want to take several persons with him, in order to assist in the sale; and this is sufficiently set forth in the plea; for it is alleged, that all three *necessarily continued* in the house for ten days, to sell the goods; and if their continuance therein were necessary, their entrance must certainly be so too, and was therefore sufficiently alleged (*p*). In Hil. 13 Hen. VII. 13, b., the distinction is taken between those licenses that are given for pleasure, and those for profit; that the former are merely personal, but that in the latter case, the person to whom the license is given may take others with him: "Et issint si home me license a avoir un arbre in son bois, mes servants justifieront le sier del arbre et l'entrer." The former branch of this distinction is also supported by a passage in Finch's law, 16 and 17; and the latter by a case in M. 13 Hen. VII. 10 (*q*). A license is not implied by law to the purchaser of goods, (though sold under an execution or distress), to enter upon the premises of the former owner and take them away, although they have remained there with his assent (*r*).

Where the plaintiff complains of several trespasses committed on several days, and the defendant pleads a license, to which the plaintiff replies *de injuriâ*, (or joins issue under sect. 79 of the C. L. P. Act, 1852), it is incumbent on the defendant to show a license for each act of trespass proved by the plaintiff. In such case it is not necessary for the plaintiff to new assign; for the meaning of the replication is, that the defendant committed the several trespasses without a license for each (*s*). Where a defendant justified the stopping the plaintiff's cart, on the ground that he was loading his cart with turf wrongfully cut from the waste of the manor, and that defendant, as bailiff of the lord, stopped the cart. Plaintiff having replied *de injuriâ*; it was held, that in order to rebut the justification, he could not give in evidence a license from the lord to cut the turf, that not having been pleaded by way of replication (*t*). License to enter and occupy land for a certain time amounts to a lease, and ought to be pleaded as such (*u*).

(*p*) *Dennett v. Grover*, Willes, 195.

(*q*) Durnford's note, Willes, 197.

(*r*) *Williams v. Morris*, 8 M. & W. 488.

(*s*) *Barnes v. Hunt*, 11 East, 451. This case has never been overruled as regards a plea of leave and license; *Adams v.*

Andrews, 15 Q. B. 284, but it is only an authority with regard to that particular plea. *Per Cur.*, *Bracegirdle v. Peacock*, 8 Q. B. 174.

(*t*) *Taylor v. Smith*, 7 Taunt. 156.

(*u*) *Adm. per Cur.*, 5 Hen. VII., 1, a., cited in *Flowd.* 542, a.

The defendant may also justify an entry into the house or land of another under a license *in law* (v). Such is the entry into an inn or tavern at seasonable times; an entry to demand rent due for the enjoyment of the land, or to distrain for the rent in arrear, or to distrain cattle damage feasant. Such also is an entry for the purpose of executing (in a legal manner) the process of the law; the entry of a remainder-man or reversioner to view the state of repair, and see whether any waste has been committed on the estate; the entry of a landlord in the absence of a tenant, who had omitted to deliver up possession when his term had expired (x). the entry of a commoner to view his cattle, and the like.

Where an entry, authority, or license, is given to any person *by law*, and he abuses it by the commission of some act, there he shall be considered as a trespasser *ab initio*; *i. e.* from the first entry; for the law determines from the subsequent act, *quo animo*, or to what intent, the original was made; as, if a person enters an inn or tavern, and afterwards commits a trespass, by carrying away anything, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*; but, in such case, if the party is guilty of a mere nonfeasance, as in the case of an entry into an inn, and refusing to pay for the liquor which he has consumed, there he cannot be considered as a trespasser *ab initio*, because a mere nonfeasance does not amount to a trespass (y). So where one who has distrained a beast damage feasant, or taken an estray, kills or works it, he shall be deemed a trespasser *ab initio* (z). So where a man enters to take one heriot to which he is entitled, and takes two (a). But a refusal to deliver the beast on tender of amends, being a mere nonfeasance, will not be considered as a trespass *ab initio* (b). It is clear, therefore, that in order to constitute a person a trespasser *ab initio*, the party must have been guilty of a subsequent act of trespass.

But where the entry, authority, or license, to do anything is given *by the party*, there, although the person to whom the authority is given may, by the commission of subsequent acts, be a trespasser, yet such subsequent acts will not affect the original entry, so as to make that which was sanctioned by the authority of the party complaining a trespass. In this case, therefore, the subsequent acts only will amount to trespasses. A person cannot justify entering the close of another to take his own property *without showing* the circumstances under which it came there; even

(v) See *Bowler v. Nicholson*, 12 A. & E. 341.

(x) *Turner v. Meymott*, 1 Bingh. 158; or even, it seems, while the tenant is on the premises; *Taunton v. Costar*, 7 T. R. 431; *Burling v. Read*, 11 Q. B. 904; although the contrary was determined in *Newton v. Harland*, 1 M. & G. 644;

Hillary v. Gay, 6 C. & P. 284. See *ante*, p. 1247.

(y) *Six Carpenters' case*, 8 Rep. 146, a.

(z) *Oxley v. Watts*, 1 T. R. 12.

(a) *Price v. Woodhouse*, 1 Exch. 559.

(b) 8 Rep. 146, b.; *West v. Nibbs*, 4 C. B. 187.

though he alleges that he did not do any unnecessary damage (*c*); but all the old authorities say, that where a party places upon his own close the goods of another, he gives to the owner of them an implied license to enter for the purpose of recaption (*d*). Hence a plea to a declaration in trespass for breaking and entering the plaintiff's close, that the plaintiff, without the defendant's leave, took his goods and placed them on the said close, wherefore the defendant entered to retake the goods, is a good justification of the entry on the plaintiff's close (*e*). If A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use (*f*).

Process (g).

It is a general rule, that an officer cannot justify the breaking open an outward door or window in order to execute process in a civil suit, but if he finds the outward door open and enters that way, or if the door be opened to him from within, and he enters, he may break open inward doors, if he finds that necessary; in order to execute his process (*h*). And, it seems, this rule holds, although the defendant be not in the house at the time; but in such case the officer must first demand admittance, and this demand must be pleaded (*i*). In the execution of criminal process against any person in the case of a misdemeanour, it is necessary to demand admittance, before the breaking the outer door can be justified (*j*). And the officer could not justify breaking the inner doors of the house of a stranger, upon suspicion that a defendant is there, to search for him in order to arrest him on mesne process (*k*). But though a sheriff cannot break into a house to take execution under a *fi. fa.*, yet, when the door is open and he enters and is disturbed in his execution by the parties who are within the house, he may break the outer door to rescue his bailiffs (*l*). So he may break the outer door in order to take goods he has seized within the house out again, after demand, or if there be no person of whom demand can be made (*m*).

A., an excise-officer, applied to the commissioners of excise for a warrant to search the house of B. The commissioners, being satisfied with the reasonableness of his suspicion, granted a warrant, empowering A. to enter the house of B., and seize all run tea which should be there found fraudulently concealed. A. accord-

(*c*) *Anthony v. Haney*, 8 Bingh. 186.

(*d*) *Per Parke, B.*, in *Patrick v. Colerick*, 3 M. & W. 483.

(*e*) *Patrick v. Colerick*, 3 M. & W. 483.

(*f*) *Rea v. Sheward*, 2 M. & W. 424.

(*g*) See *ante*, tit. "Imprisonment," p. 862.

(*h*) Foster's "Discourse of Homicide,"

chap. 8, sect. 19.

(*i*) *Ratcliffe v. Burton*, 3 B. & P. 223.

(*j*) *Launock v. Brown*, 2 B. & Ald. 592.

(*k*) *Johnson v. Leigh*, 6 Taunt. 246.

(*l*) *White v. Wiltshire*, Cro. Jac. 555.

(*m*) *Pugh v. Griffith*, 7 A. & E. 827.

ingly entered B.'s house, in the daytime, and broke open a lock which B. had refused to open, and rummaged his goods, but did not find any tea. In an action of trespass brought by B. against the officer; it was held, that upon the true construction of the 10 Geo. I. c. 10, s. 13, the officer was justified, although there was not any tea found, or any evidence given of the grounds of his suspicion (*n*). In an action against a sheriff for breaking and entering plaintiff's house, and staying therein three weeks, the defendant pleaded a justification under process as to breaking and entering, and staying in the house twenty-four hours. The plaintiff, admitting the writ, replied *de injuriâ absque residuo causæ*. The defendants proved their justification; but it appeared that the officer continued in the plaintiff's house beyond twenty-four hours. Lord *Ellenborough* was of opinion, that the plea applied to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. *The residue of the cause* mentioned in the plea was alone put in issue, and the length of time, during which the officers remained in the house, was rendered immaterial (*o*). For the powers given to messengers in bankruptcy, acting under warrant of the court, to break open houses, &c., see 12 & 13 Vict. c. 106, ss. 109, 110, 111.

Right of Common.

The defendant may justify under a right of common of pasture, of estovers, or of turbary. See *ante*, tit. "Common," and tit. "Replevin," VII.

Right of Way (p).

To trespass *qu. cl. fr.* the defendant may plead a right of way over the *locus in quo*, and that in the exercise of such right he committed the trespasses complained of. There are four kinds of ways (*q*): 1, a footway; 2, a horseway, which includes a footway; 3, a carriageway, which includes both horseway and footway; 4, a driftway. Although a carriageway comprehends a horseway, yet it does not necessarily include a driftway (*r*). It is said, however, that evidence of a carriageway is strong presumptive evidence of the grant of a driftway (*s*). These ways are either public, or highways for all persons, or private ways. "If a way lead to a market, and is a common way for all travellers, and communicates with a great road, it is an highway; but if it leads only to a church, to a private house, or village, or to fields, it is a private way. But this is matter of fact, and much depends on reputation." *Per Hale*, C. J. (*t*).

(*n*) *Cooper v. Booth*, 3 Esp. 135.

(*o*) *Monprivatt v. Smith*, 2 Campb. 175.

(*p*) See *ante*, p. 1080.

(*q*) 1 Inst. 56, a.

(*r*) *Ballard v. Dyson*, 1 Taunt. 279.

(*s*) *Per Chambre, J., S. C.*

(*t*) *Austin's case*, 1 Vent. 189.

Public Way.—An highway (termed in law French *chimin*) is a way for all the king's subjects to pass and repass (*u*). It is called *regia via*, or the king's highway, although the king can only claim a passage for himself and his subjects; for the freehold and the profits growing there, as trees and other things, are in the lord of the soil. Where there has been a public king's highway, no length of time, during which it may not have been used, will prevent the public from resuming the right, if they think proper (*v*). An act of Parliament is the only means by which such a public right can be determined (*x*). The public have not any common law right of bathing in the sea; and as incident thereto, of crossing the sea-shore on foot, or with bathing-machines for that purpose (*y*).

Where the owner of land builds houses upon it, forming a street, which he permits to be used as a highway, although an absolute transfer of the property in the soil cannot be presumed, yet a dedication of the way to the public will be presumed, so far as the public have occasion for it, for the purpose of passing and repassing along the same (*z*). But proof of a bar having been placed across the street, at the time when the street was made, even although such bar may have been subsequently destroyed, will rebut the presumption of a dedication to the public: for it must appear that the dedication was made openly, and with a deliberate purpose (*a*). Permitting the public to have the free use of a way in a street in London for six years, has been held sufficient evidence of a dedication, where no bar has been put up (*b*). But no particular time is *necessary* for evidence of a dedication; it is not, like a grant, presumed from length of time. If the act of dedication be unequivocal it may take place immediately; for instance, if a man builds a double row of houses opening into an ancient street at each end, and makes a street, and sells or lets the houses, that is instantly a highway (*c*). To constitute a dedication there must be a clear intention to dedicate (*d*); of which the user by

(*u*) *Terms de la Ley*, *Chimin*; *Bro. Abr. Chimin*, pl. 9, 10, 11.

(*v*) *Per Gibbs, J.*, in *R. v. The Inhabitants of St. James, Taunton*, MS.

(*x*) *Per Holroyd, J.*, *Vooght v. Winch*, 2 B. & Ald. 670.

(*y*) *Blundell v. Catterall*, 5 B. & Ald. 268. See *Benest v. Pipon*, Lord Wynford's judgment, Cases before the Privy Council, by J. W. Knapp, vol. 1, p. 67.

(*z*) *Lade v. Shepherd*, 2 Str. 1004.

(*a*) *Roberts v. Karr*, 1 Campb. 262.

(*b*) *Per Lord Kenyon, C. J.*, *Trustees of Rugby Charity v. Merryweather*, 11 East, 376, n. This was the case of a thoroughfare. But where the plaintiff made a street, leading out of a highway, across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end

of the street for twenty-one years, (during ten of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways, and half the horseway, paved at the expense of the inhabitants,) by the defendant's fence; it was held, that this street was not so dedicated to the public, that the defendant pulling down his fence might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*, 5 Taunt. 125. See *Jarvis v. Dean*, 3 Bingh. 447. There may, however, be a highway without its being a thoroughfare. *Bateman v. Bluck*, 18 Q. B. 870.

(*c*) *Per Chambre, J.*, *Woodyer v. Hadden*, 5 Taunt. 125.

(*d*) *Barraclough v. Johnson*, 8 A. & E. 99.

the public is evidence (e). And a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (f). Trespass for entering plaintiff's close and pulling down a gate. Plea, that there was a public footway over the *locus in quo*, and because the gate was wrongfully erected across the same, defendant pulled it down. It appeared in evidence, that the gate in question had been recently put up in a place where a similar gate had formerly stood, but where, for the last twelve years, there had been none. It was thereupon contended, for the defendant, that, from suffering the gate to be down so long, and permitting the public to use the way, without obstruction, for so many years, the plaintiff, and those under whom he claimed, must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. The plaintiff, however, had a verdict; which the Court of King's Bench refused to set aside (g).

Dedication may be inferred against the crown (h). So trustees for certain public purposes may dedicate a highway to the use of the public, provided such use be not inconsistent with the purposes for which the land is vested in them (i); *a fortiori*, therefore, a company established for profit (j). "When there is satisfactory evidence of such a user of a road, as to time, manner, and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was, from whom the dedication, necessarily inferred from such user, first proceeded" (k).

To give the public a right, however, the dedication must be with the consent of the owner of the fee; for where it is given by an individual having only a limited right, it continues for a limited period only. In trespass and justification under a public right of way, it appeared that the *locus in quo* had been under lease from 1719 to 1818; but as far back as living memory could go it had been used by the public, though not a thoroughfare, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who had previously lived for twenty-four years in the neighbourhood, inclosed it. It was held, that, under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could not be any dedication to the public by the tenants for ninety-nine years, nor by any one except the owner of the fee (l). But where express (or perhaps

(e) *Poole v. Huskinson*, 11 M. & W. 827.

(f) *Per Parke, B., Poole v. Huskinson*, 11 M. & W. 827.

(g) *Lethbridge v. Winter*, 1 Campb. 263.

(h) *R. v. East Mark*, 11 Q. B. 877.

(i) *R. v. Leake*, 5 B. & Ad. 469.

(j) *Surrey Canal Company v. Hall*, 1 M. & G. 396.

(k) *Per Coleridge, J., R. v. Petrie*, 4 E. & B. 744.

(l) *Wood v. Veal*, 5 B. & Ald. 454.

where implied) notice of the user has been given to the owner, and there has been a frequent change of tenants, so that the owner might have interfered, if he had pleased, his acquiescence in the dedication may be presumed (*m*).

There may be a dedication of a highway for a *limited purpose*, as for a horseway, footway, driftway (or a road for all purposes, except that of carrying coals) (*n*), or of a bridge during floods (*o*): but there cannot be a dedication to a *limited part of the public*, as to a particular parish: and dedication from continuous user can only be presumed in favour of the public (*p*). Such a partial dedication is simply void, and does not operate as a dedication to the whole public (*q*). So there can be no dedication to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity. Neither can the public by non-user release their right (*r*). But a highway may have been granted, before legal memory, subject in parts to interruption, for a beneficial public purpose, and for a limited time, as in the ordinary case of fairs, markets, &c. (*s*). So a highway may be dedicated to the public subject to a right of user by the occupiers of adjoining land for the purpose of depositing goods thereon (*t*).

Private Way.—A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant; prescription; custom; express reservation; as necessarily incident to a grant of land; or by virtue of an Inclosure Act.

By Grant.—A private way may be claimed by grant: as, if A. grant that B. shall have a way from C. through such a close (belonging to A.) to M. So if A. covenants that B. shall enjoy such a way, it amounts to a grant (*u*). When a close is conveyed together with a right of way to it, such right of way becomes appurtenant to the land, and passes by a parol demise of the close to a tenant, although no mention be said about it at the time of the demise (*v*). Under the grant “*of a free and convenient way in, through, and over a slip of land, leading from ——— to ———, with liberty to make and lay causeways, &c.,*” and “*to use the same with carriages, and to carry coals, &c.,*” the grantee has a right to make any such way, as is necessary for the carrying that commodity, *e. g.*, a framed waggonway (*w*). So the grant of a “*sufficient wayleave and stay-*

(*m*) *R. v. Barr*, 4 Campb. 16. See ante, p. 1080.

(*n*) *Marquis of Stafford v. Coymey*, 7 B. & C. 257.

(*o*) *R. v. Buckingham*, 4 Campb. 189; *R. v. Northampton*, 2 M. & S. 262.

(*p*) *Vestry of Bermondsey v. Brown*, L. R. 1, Eq. 204.

(*q*) *Poole v. Huskinson*, 11 M. & W. 827.

(*r*) *Davies v. Hawkins*, 8 C. B. (N. S.) 288.

(*s*) *Ellwood v. Bullock*, 6 Q. B. 383.

(*t*) *Morant v. Chamberlin*, 6 H. & N. 541.

(*u*) *Holms v. Seller*, 3 Lev. 305.

(*v*) *Skull v. Glenister*, 16 C. B. (N. S.) 81; 33 L. J., C. P. 185.

(*w*) *Senhouse v. Christian*, 1 T. R. 560.

leave" to coal-pits would, it seems, authorize the construction of a railway, with cuttings, embankments, &c., if necessary for the purposes of the mine (x). But under a grant of a way from A. to B. "*in, through, over, and along*" a particular way, the grantee is not justified in making a transverse road *across* the same (y). If a person has a way through a close in a particular direction, and he afterwards purchases other closes adjoining, he cannot extend the way to those closes (z).

A lease was granted, in 1814, to take effect from 1820, of certain houses, together with a piece of ground which was a part of an adjoining yard, and all ways "with the said premises, or any part thereof, used or enjoyed." At the time of granting the lease, the whole yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard. It was held, that the lessee was entitled to such right of way to the part of the yard demised to him (a). But this rule only extends to a right of way actually used at the time of the grant, lease, &c. Where, therefore, the plaintiff conveyed to the defendant a house, stable, and field lying at the back thereof, and granted to the defendant, his heirs, &c., "all ways, &c., to the said land belonging, or usually held, occupied or enjoyed therewith," and it appeared that at the time of the grant a right of way existed over a private road of the plaintiff to the said field *through a particular gateway*, which the defendant had subsequently stopped up, and that he had then opened another gateway, in another part of the fence, from the private road into the field; it was held, that trespass would lie against him for passing along the private road to the field through the new gateway, which was not used or enjoyed with the land at the time of the grant (b). If premises are demised or conveyed, with right of way thereto, it is a question for the jury, what is a reasonable use of the way (c).

At common law, the right to repair is incident to the grant of a way (d). A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide (which divided those houses from a house then belonging to A.), the right of using the piece of land as a foot or carriageway, and gave him "all other powers, &c. incident or necessary to the enjoyment of the way;" it was held, that, under the terms of this grant, the grantee was entitled to put down a flagstone upon a piece of land in front of a door opened by him out of his house into this piece of land; *Chambre, J.*, observing, that the nature of the thing was material in considering the effect of the words. The way was granted for the occupation of a dwelling-house, and the

(x) *Dand v. Kingscote*, 6 M. & W. 174.

(y) *Senhouse v. Christian*, 1 T. R. 560.

(z) *Howell v. King*, 1 Mod. 190.

(a) *Kooystra v. Lucas*, 5 B. & Ald.

830. See *James v. Plant*, 4 A. & E. 761.

(b) *Henning v. Burnett*, 8 Ex. 187.

(c) *Hawkins v. Carbines*, 27 L. J., Ex. 44.

(d) 1 Wms. Saund. 322 c. n. (3).

grantee ought to have everything needful for the occupation of his dwelling-house; he ought, therefore, to have the opportunity of repairing the way in such a manner, that it should not be wet or dirty, when he, or his family, or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference; but that was not the case here, nor was it to be feared that any right could hereafter be set up, in respect of the soil, in consequence of this stone having been put down; for the precise extent of the road was pointed out (*e*). Hence, a person having a *private* way over the land of another cannot, when the way has become impassable by the overflowing of a river, justify going on the adjoining land, although such land, together with the land over which the way is, both belong to the grantor of the way (*f*). Highways are governed by a different principle. They are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line (*g*).

By Prescription.—A private way may also be claimed by prescription (*h*), *e. g.*, that defendant is seised in fee of a certain messuage, and that he, and all those *whose estate he has* in the said messuage, have, from time immemorial, had a footway, &c. (as the case may be) from — to —. From the words in italics, this plea is termed prescribing in a *que estate*. By 2 & 3 Will. IV. c. 71, s. 5, (*ante*, p. 386,) where a party used to allege his claim from time immemorial, the period mentioned in the act may be alleged, and the party need not claim, as heretofore, in the name or right of the owner of the fee. But the claim by immemorial prescription may be made as well. In pleading a prescriptive private way, it is not necessary to describe all the closes intervening between the two termini (*i*). A right of way being an easement merely, and not an interest, it is not proper to lay the way as appendant or appurtenant (*k*).

Unity of possession of the land to which a way is appurtenant by prescription, and of the land over which the way is, will extinguish the way; for the prescription is gone, and the way is against common right (*l*). Where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and, after such extinguishment, or during such suspension of the right, the way cannot pass as an appurtenant, under the ordinary legal sense of the word. In the case of a unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended

(*e*) *Gerrard v. Cooke*, 2 N. R. 109.

(*f*) *Taylor v. Whitehead*, Doug. 744.

(*g*) *Per Lord Mansfield*, C. J., S. C.

(*h*) Rast. Entr. 617, pl. 5, ed. 2.

(*i*) *Simpson v. Lewthwaite*, 3 B. & Ad 226.

(*k*) *Godley v. Frith*, Yelv. 159.

(*l*) 1 Roll. Abr. 935 (C.), pl. 8.

in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land," which forms the subject-matter of the conveyance (*m*). A part of a way may be extinguished by unity of seisin, and the right to the rest remain (*n*).

By Custom.—A custom that every inhabitant of such a vill shall have a way over such land, either to church or to market is good, because it is but an easement, and not a profit. A titheowner was entitled to make use of the road ordinarily used for the ordinary occupation of the close, in which the tithe was taken; but he could not justify carrying his tithes home, by any other road, although the farmer himself might have used it for the occupation of his farm (*o*).

By express Reservation.—A right of way is sometimes said to be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land (*p*). A right of way, however, "cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing" (*q*). The lessee or grantee must therefore have executed the deed.

For Necessity.—If a person having a close bounded on every side by his own land, grants the close to another, the grantee shall have a way to the close, as incident to the grant, or, as it is sometimes termed, a way of necessity; for otherwise he cannot derive any benefit from the grant (*r*). So if A. has four closes lying together, and sells three of them to B., reserving the middle close, to which A. has not any way except through one of those closes which he sold, although he reserved not any way, yet A. shall have a way to the middle close, as reserved to him by operation of law (*s*); and unity of possession will not extinguish this species of way (*t*); unless (*semble*) it be discontinued during the unity (*u*). But no general way of necessity exists in point of law (*x*). Such a

(*m*) *Per Tindal*, C. J., delivering judgment in *James v. Plant*, 4 A. & E. 761. See *ante*, p. 1079, as to unity of possession.

(*n*) *Wright v. Rattray*, 1 East, 377.

(*o*) *Cobb v. Selby*, 2 N. R. 466. See also 1 Bulstr. 108.

(*p*) See *Allan v. Gomme*, 11 A. & E. 759.

(*q*) *Per Tindal*, C. J., delivering judgment;

Durham and Sunderland Railway Company v. Walker, 2 Q. B. 967.

(*r*) 2 Roll. Abr. 60, pl. 17; *Pinnington v. Galland*, 9 Ex. 1.

(*s*) *Per Cur.*, *Clark v. Cogge*, Cro. Jac. 170.

(*t*) *Beaudley v. Brook*, Cro. Jac. 190.

(*u*) Com. Dig. Suspension (B).

(*x*) 1 Wins. Saund. 323, n. (6).

way can only arise by grant express or implied (*y*); and cannot therefore be pleaded generally, without showing the manner in which the land, over which the way is claimed, is charged with it (*z*); and also that no other way existed (*a*); for such a way is limited by the necessity which creates it, and ceases, if, at any subsequent period, the person entitled to it can approach the place to which it led, by passing over his own land (*b*). J. S., as a trustee, conveyed land to another, to which there was not any way, except over the trustee's land; it was held, that a right of way passed of necessity, as incidental to the grant (*c*). And so in the case of a devise (*d*).

If A., the owner of a close over which there is a right of way, plough up the way and assign a new way, any person may justify using the new way as long as it lies open (*e*); but if A. afterwards stops up the new way, the removal of the obstruction to the new way cannot be justified (*f*). A way of necessity exists after unity of possession of the close to which, and the close over which, and after a subsequent severance. If a person purchases close A., with a way of necessity thereto over close B., a stranger's land, and afterwards purchases close B., and then purchases close C., adjoining to close A., and through which he may enter close A., and then sells close B. without reservation of any way, and then sells closes A. and C. to one purchaser, the purchaser of close A. shall nevertheless have the ancient way of necessity to close A. over close B. (*g*).

Pleading Right of Way.—In pleading a right of way, the defendant ought to show the nature of the way, *i. e.* whether it be a footway, horseway, or carriageway (*h*). This rule applies both to public and private ways; but in other respects the form of pleading a public highway is more general than that of pleading a private way. Thus, it has been held, that in a plea of a public highway, it is not necessary to state either the places from which and to which it leads (*i*); or its direction (*k*); or how it became such highway; it is sufficient to state compendiously that it is a public highway (*l*). But wherever the precise locality becomes material to the defence, the defendant is bound to fix it in his pleadings (*m*).

(*y*) *Proctor v. Hodgson*, 10 Ex. 824.

(*z*) *Bullard v. Harrison*, 4 M. & S. 387.

(*a*) *Proctor v. Hodgson*, 10 Ex. 824.

(*b*) *Holmes v. Goring*, 2 Bingh. 76.

(*c*) *Hovton v. Frearson*, 8 T. R. 50.

(*d*) *Pearson v. Spenser*, 3 B. & S. 761, in error.

(*e*) *Horne v. Widlake*, Yelv. 141.

(*f*) *Reignolds v. Edwards*, Willes, 282.

(*g*) *Buckby v. Coles*, 5 Taunt. 311. But see *Holmes v. Goring*, 2 Bing. 76; and

after the decision in *Pinnington v. Gal-land*, 9 Ex. 1, this case can hardly be supported.

(*h*) *Alban v. Brounsall*, Yelv. 163. Form 46, Sched. B., Com. Law Proc. Act, 1852.

(*i*) *Rouse v. Bardin*, 1 H. Bl. 351.

(*k*) Per Lord Denman, C. J., in *Ellison v. Isles*, 11 A. & E. 674.

(*l*) *Aspindall v. Brown*, 3 T. R. 265.

(*m*) *Ellison v. Isles*, 11 A. & E. 665.

In pleading a private way, the *terminus a quo*, and *terminus ad quem*, ought to be set forth (n).

In replying to a plea of right of way, the plaintiff either admits the right, and new assigns; *e. g. extra viam*, or that the defendant used the way in a different manner than that to which he was entitled; or he denies the right, or replies *de injuriâ* (o), or joins issue under the 79th section of the C. L. P. Act, 1852. Under the last three replications, which put the same facts in issue, the plaintiff may give in evidence, that the way has been stopped up by an order of justices (p). Trespass for breaking and entering the plaintiff's close, which was set out by abutments, and pulling down posts and rails standing thereon. Plea, a public footway over the close, and that the defendants, because the posts and bars obstructed the footway, pulled them down. Replication, traversing the footway. Held, that on these pleadings the defendants were entitled to a verdict, on proof of a footway *in any direction* over the close, and were not bound to prove a way over the place, where the posts and rails stood (q); and *per Lord Abinger*, C. B., "the plaintiff should have new assigned." Where the first count of the declaration charged a trespass in two closes which were named, and the second charged a trespass in the same closes "in other parts thereof," and the defendant pleaded to both counts, a public right of way over the said closes; and issue thereon; it was held, that the defendant, upon proof of one right of way over both closes, was entitled to the verdict; for the second count was idle, and carried the complaint no further than the first (r). Where to an action of trespass *qu. cl. fr.* the defendant pleaded a right of way; to which the plaintiff new assigned, that he sued for a trespass committed on a certain *other portion* of the close (setting out the same by abutments), and the defendant pleaded to the new assignment, that while he was entitled to the way in the plea mentioned, the plaintiff obstructed it, whereupon he (defendant) deviated and committed the trespasses in the new assignment mentioned; it was held, that the new assignment was substantially a fresh declaration, and did not admit the right of way mentioned in the plea; and that the defendant, under these pleadings, was bound to prove both the right of way alleged, and the obstruction (s).

Tender of Amends.

If a person brings an action of trespass for taking away his beasts, or other *goods*, tender of sufficient amends before action brought is not a bar; because the party making the tender is not

(n) 2 Leon. 10. See Form 46, Sched. B., Com. Law Proc. Act, 1852.

(o) Com. Law Proc. Act, 1852, s. 77.

(p) See 5 & 6 Will. IV. c. 50, ss. 84 to 92.

(q) *Webber v. Sparkes*, 10 M. & W. 485.

(r) *Wood v. Wedgewood*, 1 C. B. 273.

(s) *Robertson v. Gauntlett*, 16 M. & W. 289.

the owner of the goods, as in the case of a distress, but a trespasser to whom the law does not show any favour (*t*). But by 21 Jac. I. c. 16, s. 5,—In all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea, to make any title or claim to the land, and the trespass be by negligence or involuntary, defendant may plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends before action brought.

V. Evidence.

The plaintiff may prove the trespass to have been committed at any time before action brought, though it be before or after the day laid in the declaration, if any. But in trespass with a *continuando*, the plaintiff ought to confine himself to the time in the declaration; yet he may waive the *continuando*, and prove a trespass on any day before action brought, or he may give in evidence only part of the time in the *continuando*. Bull. N. P. 86. So where trespasses are alleged to have been committed on a particular day, and on divers other days and times between that day and the commencement of the action, the plaintiff may prove either one trespass before the day specified, or as many trespasses as he can within the space of time mentioned in the declaration, but he cannot do both, and must waive the one or the other. *Per Gould, J.*, Northumberland Summ. Ass. 1775, MS., *Chambre, J.*

In trespass against several, the plaintiff having proved a joint trespass by all, cannot waive that, and give evidence of another trespass committed by one defendant only (*u*). In trespass against several, where, upon proof of trespasses affecting different defendants, counsel for the plaintiff elect to proceed on trespasses affecting two only of the defendants, he cannot afterwards proceed, even as against those defendants on other trespasses affecting all the defendants (*x*). Declarations respecting the subject-matter of a cause, by a person who at the time of making them had the same interest in such matter as the plaintiff; were held to be admissible in evidence against him, although the maker of them was alive, and might have been called as a witness (*y*).

Where the declaration charges the commission of trespasses in a close which it describes by abutments, the plaintiff, in support of the declaration, is not obliged to prove trespasses committed in every part of the close. And if the defendant pleads, that the close in which, &c., is part of certain ground which was set out under an award for particular purposes, and that he (defendant) is entitled to use it for those purposes; and, if it appear, that the whole extent

(*t*) 2 Inst. 107.

(*u*) *Tait v. Harris*, 1 M. & Rob. 282.
But see *per Patteson, J.*, *Hitchen v.*

Teale, 2 M. & Rob. 31.

(*x*) *Hitchen v. Teale*, 2 M. & Rob. 31.

(*y*) *Woolway v. Rowe*, 1 A. & E. 114.

of ground mentioned in the plea was not set out under the award, but that part of it was so set out, and that the place where the trespasses proved were committed was within that part, then the defendant has proved his justification; for as the plaintiff is not bound to carry his proof of trespasses to every part of the close mentioned in the declaration, so the defendant is not bound to support his justification as to all parts. The "close in which, &c." does not mean the whole close referred to in the declaration, but the place in which the trespass is proved to have been committed, and the plaintiff or defendant may so apply it (*z*).

To support a plea under the 2 & 3 Will. IV. c. 71, s. 2 (see *ante*, tits. "Common," VII., and "Nuisance," I.), of a right of way enjoyed for forty years, evidence may be given of user more than forty years back (*a*). But the plea is not supported by proof of user from a period of fifty years before the commencement of the action down to within four years of it (*b*). Under a replication, denying that the defendant had used the way for forty years as of right and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time; as that it was used by stealth, or in the absence of the occupier of the close and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it is an user or enjoyment under a claim of right; the words of the fifth section "not inconsistent with the simple fact of enjoyment," being referable to the fact of enjoyment as before stated in the act, *viz.*, an enjoyment claimed and exercised "as of right" (*c*).

VI. Damages—Costs.

Damages.—By 3 & 4 Will. IV. c. 42, s. 29,—In actions of trespass *de bonis asportatis*, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the seizure. In trespass for taking goods under process upon a regular judgment, but in a place to which the process does not run, the plaintiff may recover the whole value of the goods, and not merely the amount of damage which he has sustained by their being taken in a wrong place (*d*). But in an action of trespass for distraining, amongst other goods, goods not distrainable, the tenant can only recover for the actual injury he has sustained, the landlord being a trespasser *ab initio* only as to

(*z*) *Bassett v. Mitchell*, 2 B. & Ad. 99.

(*a*) *Lawson v. Langley*, 4 A. & E. 890.

But see *Lowe v. Carpenter*, 6 Ex. 825, *ante*, p. 384.

(*b*) *Parker v. Mitchell*, 11 A. & E.

788.

(*c*) *Beasley v. Clarke*, 2 B. N. C. 709.

(*d*) *Sowell v. Champion*, 6 A. & E. 407.

such goods as were not distrainable (*e*). If the seller of goods retake them from the buyer before they have been paid for, the buyer may nevertheless recover as damages in trespass the whole value of them, and the jury cannot allow any deduction on account of the debt the buyer owes the seller for the price unpaid (*f*).

In trespass for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition (*g*). In trespass for breaking and entering a mine, and taking coals therefrom, when the defendant is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels; and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals got from the mine (*h*); but the defendant must be allowed for his expense and labour in removing the coal and bringing it to the pit's mouth, though not in first severing it from the mine (*i*).

Verdict.—Upon a plea of a right of way to fetch water and goods from a river, the jury having found the right to fetch water, and negatived the right to fetch goods, the court ordered judgment to be entered for the defendant as to the right to fetch water, and for the plaintiff as to the right to fetch goods (*k*). But where to an action of trespass, the defendant pleaded a right of way on foot and with horses, cattle, carts, waggons, and other carriages, for the convenient occupation of his close, K. : the jury having found that he had a right of carting wood and timber only from K. (which was not mentioned in the plea); it was held, that the plaintiff was entitled to the entire verdict, and that defendant could not enter it distributively for such right as the jury found (*l*). Trespass for breaking and entering the plaintiff's house, and seizing and taking his goods, which were described by distinct parcels. Pleas, that the house and goods were not the plaintiff's, and the goods were those of a bankrupt, justifying the seizure under a warrant from the commissioners; and issues thereon. Held that the issues were divisible (*m*). So where the plaintiff, in his replication, made title to three closes, on which the parties went to issue, and the plaintiff on the trial gave evidence as to two only, it was held, that the issue was divisible, and that the verdict as to one must be entered for the defendant (*n*). But where to an action for a trespass to a party-wall, which was described in the declaration as

(*e*) *Harvey v. Pocock*, 11 M. & W. 740.

(*f*) *Gillard v. Brittan*, 8 M. & W. 575.

(*g*) *Jones v. Gooday*, 8 M. & W. 146.

(*h*) *Wild v. Holt*, 9 M. & W. 672. See post, "Trover," "damages."

(*i*) *Morgan v. Powell*, 3 Q. B. 278.

(*k*) *Knight v. Woore*, 3 B. N. C. 3.

(*l*) *Higham v. Rabett*, 5 B. N. C. 622. See *Ivatt v. Mann*, 3 M. & G. 691.

(*m*) *Routledge v. Abbott*, 8 A. & E. 592.

(*n*) *Phythian v. White*, 1 M. & W. 216.

bounded by a workshop of the defendant, the defendant pleaded, that it was not the plaintiff's; it was held, that the defendant was entitled to a verdict, for that the plaintiff must be understood to have brought his action for the whole wall, and even if it could be treated as two walls, defendant's part could not be considered as part of the workshop, and therefore the plaintiff had not proved his property in the wall as described in the declaration (*o*).

Costs.—The 3rd Pl. R., H. T. 1853, giving the judge or presiding officer power to certify, at the trial, to deprive the plaintiff or defendant of costs, where there is more than one count, plea, &c. "founded on the same cause of action or ground of answer or defence," only applies to cases where issues of fact have been raised and tried, on which issues a verdict might have passed for or against the plaintiff or defendant respectively, and not to cases where, on one of such counts or pleas, issues in fact are tried and found for the plaintiff or defendant, and upon the other issues in law are depending, upon which nominal damages are assessed at the trial contingently. The judge cannot certify in such a case (*p*).

Where, in an action of trespass, by A. against B., C., D., who defended jointly, a verdict was found against C. and D. on all the issues, and for B. on all the issues; it was held, that B. was entitled to a third part of the costs of the joint defence, which might be set off against and deducted from the costs of A. against C. and D. (*q*).

(*o*) *Murly v. M'Dermott*, 8 A. & E. 138.

(*q*) *Norman v. Climenson*, 4 M. & G. 423.

(*p*) *Head v. Baldrey*, 11 A. & E. 906.

CHAPTER XXXIX.

TROVER.

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I. *Of the Nature of the Action, and in what cases it may be maintained.*

THE action of trover is a special action upon the case, which may be maintained by any person who has either an absolute or special property in goods, for recovering the value of such goods, against another, who having, or being supposed to have, obtained possession of such goods by lawful means, has wrongfully converted them to his own use. In order to maintain an action of trover, it is necessary that it should appear, 1. That the plaintiff had either an absolute or a special property in the goods, which are the subject of the action. 2. That the plaintiff had the right of possession in the goods. 3. That personal goods be the subject-matter of the action. 4. That the defendant has been guilty of a wrongful conversion.

Absolute Property.—It must appear that the plaintiff had a

property, either absolute or special, in the goods which are the subject of the action; but it is not necessary to show that the plaintiff had both an absolute *and* a special property; either the one or the other is sufficient. Absolute property is where one having the possession (or right of possession) of goods, has also the exclusive right to enjoy them, and which can only be defeated by his own act. Special property is where he who has the possession (or right of possession) holds the goods subject to the claims of other persons (a).

Timber, while standing, is part of the inheritance; but when severed, either by the act of God, as by tempest, or by a trespasser and by wrong, belongs to him who has the first estate of inheritance, whether in fee or in tail, who may bring trover for it (b). Trover was brought by a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon, and had been severed from, the estate, and was in the possession of the defendant. It was held, that the plaintiff could not recover; because an action of trover must be founded on the property of the plaintiff, and in this case the plaintiff had not any property in the timber; for a tenant for life, without impeachment of waste, has a right to the trees at the moment when they are cut down (c). In like manner, tenant in tail, after possibility of issue extinct, is entitled to timber when cut (d). Trustees of an estate *pur autre vie* cannot maintain trover for trees felled upon the estate; for although they have a special property in the trees while standing, yet that property ceases when they are cut down, and the trees then belong to the owner of the inheritance (e). It was for a long time doubtful whether the landlord had such a possession of timber cut down during the continuance of a lease, as to maintain trover; but it was finally determined that he had; because the interest of the lessee in the timber remained no longer than while it was growing on the land demised, and determined instantly upon the severance (f). The defendant, a wharfinger, having acknowledged timber on his wharf to be the property of the plaintiff; it was held, that he could not afterwards dispute it, and set up the title of a third person (g).

The owner of stolen property can maintain trover against a third person, in whose possession he finds it (h); provided (*semble*), such third person be innocent of the felonious transaction (i); and

(a) *Per Lawrence, J.*, 7 T. R. 398.

(b) *Per Lord Talbot, C.*, in *Bewick v. Whitfield*, 3 P. Wms. 268.

(c) *Pyne v. Dor*, 1 T. R. 55.

(d) *Williams v. Williams*, 12 East, 209.

(e) *Blaker v. Anscombe*, 1 N. R. 25.

(f) *Berry v. Herd*, Cro. Car. 242.

(g) *Gosling v. Birnie*, 7 Bingh. 339.
Acc. per Best, J., in *Hawes v. Watson*, 2

B. & C. 545. But see *Wilson v. Anderson*, 1 B. & Ad. 450; and *note*, that in the principal case the defendant was fully acquainted with the circumstances relating to the claim of the third party, when he made the admission.

(h) *Lee v. Bayes*, 18 C. B. 599.

(i) *White v. Spettigue*, 13 M. & W. 603.

unless the property has been altered by a sale in market overt (*k*). By the 7 & 8 Geo. IV. c. 29, s. 57 (which is substantially a re-enactment of the 21 Hen. VIII. c. 11),—If any person guilty of felony or misdemeanor in stealing or knowingly receiving any property, shall be indicted and convicted by the owner or his representative, “the *property shall be restored* to the owner or his representative;” and the court before whom the person shall be convicted may also make an order of restitution, except in the case of negotiable securities transferred for a valuable consideration, and without notice or reasonable suspicion of the felony. Under this section the owner of the stolen property may maintain trover for it, on conviction of the thief, although there has been a sale in market overt (*l*); but not, it seems, against a person who has purchased the goods in market overt and sold them again *before* conviction, notwithstanding the owner gave the purchaser notice of the robbery, while the goods were in his possession; for, in order to maintain trover, the plaintiff must prove that the goods were his property, and that, *while they were so*, they came into the possession of the defendant; whereas by the sale in market overt the property was altered, and the statute did not re-vest it till the attainder of the felon (*m*). Where, therefore, property, feloniously taken from the plaintiff, was sold by the felon to defendant, who purchased *bonâ fide*, but not in market overt; and the plaintiff gave notice of the felony to the defendant, and demanded the goods, which the defendant refused to deliver, and *afterwards* sold the property in market overt, after which the plaintiff prosecuted the felon to conviction; it was held, that the plaintiff might recover from the defendant the value of the property (*n*).

The rule is the same, generally, with regard to goods obtained by fraud (*o*); there is no distinction between fraud and felony in this respect (*p*). Thus if a vendee purchase goods with the preconceived idea of not paying for them, such sale does not pass the property therein (*q*). So where the plaintiff, having been imposed upon by a swindler, consigned a box, by the defendants, as common carriers, duly directed to J. W., &c., and the defendants, on finding that no such person as J. W. resided at the address given on

(*k*) 2 Inst. 714. A sale of goods in a shop in the city of London, where goods of the same kind are usually sold, though the place be described in evidence as “an open warehouse,” and people cannot see from the outside what passes therein, is a sale in market overt; *Lyons v. De Pass*, 11 A. & E. 326. But a wharfinger’s wharf, even in London, is not; *Wilkinson v. King*, 2 Campb. 335. With respect to stolen horses, the property is not altered by a sale in market overt, unless the provisions of the 2 & 3 P. & M. c. 7, and 31 Eliz. c. 13 have been complied

with.

(*l*) *Scattergood v. Silvester*, 15 Q. B. 506.

(*m*) *Horwood v. Smith*, 2 T. R. 750.

(*n*) *Peer v. Humphrey*, 2 A. & E. 495.

(*o*) *Noble v. Adams*, 7 Taunt. 59. If the fraud amounts to the offence of obtaining goods by false pretences, the provisions of the 7 & 8 Geo. IV. c. 29 (*supra*) are applicable.

(*p*) See *Peer v. Humphrey*, 2 A. & E. 499.

(*q*) *Load v. Green*, 15 M. & W. 216.

the box, did not return the box to the plaintiff, but, on receiving a letter from a person signing himself J. W., directing the box to be forwarded to a public-house, sent it there; it was held, that the defendants were liable in trover (*r*). A mere consciousness of inability to pay for goods when they are ordered is not, it seems, conclusive evidence of such fraud as will vacate a contract (*s*). Where the plaintiff, in order to protect his personal effects from his creditors delivered them to the defendant, and, in order that the latter might appear to be the true owner, made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale, it was held that the plaintiff, as between himself and the defendant, was not estopped from showing the real character of the transaction and recovering the goods back from the defendant (*t*).

But a sale effected by the fraud of the buyer is void only at the election of the seller; and if, before he has elected to avoid it, the buyer resells the goods to a *bonâ fide* purchaser (*u*), or pledges them for a *bonâ fide* advance (*v*), the property will pass. "Although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal consequence is, that if, before the disaffirmance, the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor;" *per Pollock, C. B.*, delivering judgment, *S. C.* It is, however, absolutely necessary that the relation of vendor and vendee should exist between the original owner of the goods and the person who has fraudulently obtained them; for if there be not a sale between these parties there is no contract, which the owner can either affirm or disaffirm (*x*). Thus where A., who had formerly been B.'s agent, and had been known to the plaintiffs as such, after his agency ceased, obtained goods from the plaintiffs in the name of B., which he handed over to the defendant, an auctioneer, by whom they were sold: it was held, that the plaintiffs might maintain trover against the defendant for the goods; for there was never any sale to A., or contract between *him* and the plaintiffs (*y*). So where A. fraudulently represents that he is B., and obtains goods from C., there is no sale at all; and any one who has *bonâ fide* made advances to A. upon the goods and sold them, under a power to repay himself, is liable in trover at the suit of C. (*z*).

(*r*) *Stephenson v. Hart*, 4 Bingh. 476.

(*s*) *Irving v. Molloy*, 7 Bingh. 543, *per Tindal, C. J.*

(*t*) *Bowes v. Foster*, 2 H. & N. 779; 27 L. J., Ex. 262.

(*u*) *White v. Garden*, 10 C. B. 919; *Stevenson v. Newman*, 13 C. B. 285.

(*v*) *Kingsford v. Merry*, 11 Ex. 577.

(*x*) *Kingsford v. Merry*, 1 H. & N. 503.

(*y*) *Higgins v. Burton*, 26 L. J., Ex. 342.

(*z*) *Hardman v. Booth*, 32 L. J., Ex. 105.

An arbitrator, to whom all matters in difference between a landlord and tenant had been referred, awarded that a stack of hay should be delivered up by the tenant to the landlord, upon being paid a certain sum for it. The landlord tendered the money, *but the tenant refused to receive it*, or to deliver up the hay: whereupon the landlord brought trover against the tenant for the hay. It was held, that this action could not be maintained; for the property was not transferred by the mere force of the award; and the landlord's only remedy was to proceed against the tenant upon the award (*a*); but Lord *Ellenborough* observed, that the case might have been different if the tenant had accepted the money tendered, for that would have been a ratification of the award, and an assent on the part of the tenant to the transfer of the property.

If a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property is immediately vested in him; and if any accident should happen to the goods, it will be at the risk of the purchaser (*b*): *a fortiori*, therefore, if the purchaser selects a particular carrier (*c*). This is on the ground that a delivery to the vendee's agent is a delivery to the vendee. But where the contract is imperfect, *e. g.* invalid by the Statute of Frauds (*d*), or the goods are sent by a conveyance not authorized by the vendee, or not authorized to be sent at all, or the vendee retains an option to refuse the goods, the property, until acceptance, remains in the vendor, and the vendee cannot maintain trover (*e*). If A. order a tradesman to send him goods by a hoyman, and the tradesman send the goods by a porter, to the house where the hoyman resides, when in town, and the porter, not finding him, leave the goods with the landlord, A. cannot maintain trover against the landlord, for the property never vested in A., but remained in the tradesman (*f*); but if the person to whom the goods were delivered had been a servant to the hoyman, and entrusted by him to receive the goods, A. might have maintained trover; for by such delivery, the property would have vested in him,

(*a*) *Hunter v. Rice*, 15 East, 100; *Thorpe v. Eyre*, 1 A. & E. 926, *acc.*

(*b*) *Dutton v. Solomonson*, 3 B. & P. 582. The only exception to the purchaser's right over the goods is, that the vendor, in the case of the purchaser becoming insolvent, may stop them *in transitu*. See *ante*, tit. "Stoppage in Transitu." Trover will not lie against a carrier for the mere non-delivery of goods, the proper form of action being case for negligence. See *ante*, p. 364.

(*c*) *Dawes v. Peck*, 8 T. R. 330, although the consignor pays for the

carriage; *S. C.* or, perhaps, though the goods be sent on approval only, *Hayes v. Wood*, Bull. N. P. 36. But see *Swain v. Shepherd*. Where there is a special agreement between the consignor and the carrier, the consignor may, it seems, sue the carrier for negligence, although the property has passed to the consignee, *Dunlop v. Lambert*, 6 Cl. & F. 627.

(*d*) *Coats v. Chaplin*, 3 Q. B. 483.

(*e*) *Swain v. Shepherd*, 1 M. & Rob. 223; *Freeman v. Birch*, 3 Q. B. 492.

(*f*) *Colston v. Woolaston*, Bull. N. P. 35.

and therefore in such case the tradesman could not have brought trover against the hoyman (g).

The property of goods passes by the indorsement and delivery of the bill of lading, by the consignee to another, *bond fide*, for a valuable consideration, and without collusion, although the indorsee knew at the time that the consignor had not received payment in money for his goods, but had taken the consignee's acceptance payable at a future day not then arrived (h). Tempany, a corn merchant at Longford, who was in the habit of consigning cargoes of corn to the plaintiffs, as his factors for sale at Liverpool, shipped on board the boat, No. 604, a full cargo of oats, and took a bill of lading or boat-receipt for them, signed by the master, bearing date the 31st of January, 1837, whereby he acknowledged the receipt of the oats on board, deliverable in Dublin to John and T. Delany, *in care for and to be shipped to* the plaintiffs in Liverpool; on the same day he procured from the master of another boat, No. 54, a like bill of lading or receipt, for 530 barrels, but no oats were then on board that boat, although a cargo was prepared for that purpose. On the 2nd of February, Tempany wrote to the plaintiffs a letter inclosing both these instruments, and stating that he had valued on the plaintiffs for 730*l. against those oats*; on the 7th, the plaintiffs received this letter, and accepted the bill of exchange, and returned it to Tempany who received it on the 9th. In the mean time, the defendant, who was a creditor of Tempany to a considerable amount, sent over Mr. Walker, an agent, to Longford. Walker arrived on the 6th, and pressed him for security; Tempany consented on that day to give him an order, addressed to Tempany's brother, his agent in Dublin, desiring him to deliver to Walker, for the defendant the cargo of boat 604, which had then sailed for Dublin, and four other cargoes, including that of boat 54 (which was stated to be 560 barrels), and also all that was in Tempany's store in Dublin. The boat 54 was then partially loaded, and Tempany promised to send the boat-receipt for it to Walker; the loading was completed on the 9th; the boat-receipt or bill of lading for 550 barrels, which were on board, signed by the master and transmitted to Walker, to whom the cargo was made deliverable, and he received it the next day; the boats were both hired by Tempany, and the men paid by him. Walker, on the 8th, procured an agreement from J. Tempany, in Dublin, to hold the oats for him when they arrived: and he afterwards got possession of the whole by legal process. It was contended, that under these circumstances, the property in neither cargo vested in the plaintiffs; first, because the instruments were not regular bills of lading, and could give no title; and secondly, that, if they were, they could not operate to give the plaintiffs a title, because they, being factors, could acquire no lien without actual possession. The court thought

(g) See *Staples v. Alden*, 2 Mod. 309,

(h) *Cuming v. Brown*, 9 East, 506.

it unnecessary to decide whether the instruments were regular bills of lading, so as to have all the properties which the custom of merchants has attached to those documents: but they held, that the property in the cargo of boat 604 vested in the plaintiffs on their acceptance of the bill, and that they were entitled to maintain trover for it; but they could not maintain trover for the cargo of boat 54, since none of it was on board, or otherwise specifically appropriated to the plaintiffs, when the receipt for that boat was given by the master; *Parke, B.* (who delivered the judgment of the court), observed, that if the intention of the parties to pass the property, whether absolute or special, in *certain ascertained chattels*, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property; and the depositary assents; it is enough: and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor as well as any other individual. With respect to the cargo of boat 54, at the time of the agreement, proved by the boat-receipt of the 31st of January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no *specific chattels* which were held for them (i).

A verbal gift of a chattel, without actual delivery, does not pass the property to the donee (k). A *donatio mortis causâ* (l) is a gift by a person *believing* himself to be at the point of death, upon the condition, that if the donor die, the donee is to keep the thing given in preference of any other; and the gift may be good, though coupled with a trust (m). It is not necessary that the donor should be actually dying: but it is essential that the donee should have immediate actual possession of the gift, and uncontrolled dominion over it, subject, however, to the express condition of the gift not passing while the donor lives (n).

"The sale of a *specific* chattel passes the property in it to the vendee without delivery. The general doctrine, that the property in chattels passes by contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell*, 2 M. & Ry. 566, in a note by the reporters; but I apprehend that the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods

(i) *Bryans v. Nix*, 4 M. & W. 775. See *ante*, pp. 1239, 1240; and *Evans v. Nichol*, 3 M. & G. 614.

(k) *Irons v. Smallpiece*, 2 B. & Ald. 551. See *ante*, p. 1247.

(l) That a chose in action (not a deed) can be the subject of such a gift, see

Moore v. Darton, 4 De G. & Sm. 517.

(m) *Hills v. Hills*, 8 M. & W. 401.

(n) *Spratley v. Wilson*, Holt, 12, in *notis*; *Bunn v. Markham*, 7 Taunt. 224. See *Reddell v. Dobree*, 10 Sim. 244; *Bouts v. Ellis*, 17 Bear. 121.

generally, no property in them passes till delivery; because until then the very goods sold are not ascertained: but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay a stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to a delivery by the vendor (*o*); and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession (*p*). The effect of the contract, therefore, is to vest the property in the bargainee" (*q*).

If a person contracts with another for the purchase of a chattel, (*e. g.* a barge,) which is not in existence at the time of the contract, although the full value of the article contracted for is paid in advance, and the order is proceeded on, yet the purchaser does not acquire any property in the article until it is finished and delivered to him (*r*); but it is otherwise where the bargain stipulates for advances, which are to be regulated by the progress of the work (*s*); *i. e.* if upon the whole contract between the parties, it seems to be their intention that the unfinished parts should pass, of which intention the payment of advances with reference to the state of progress of the work (*e. g.* a vessel) is one evidence (*t*). But separate articles, such as engines, cordage, the rudder, &c., destined only to form part of the ship, but which have never been attached to it, do not, it seems, pass. *S. C.*

After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then, if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person (*u*). "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. *And if the horse die in my stable, between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer*" (*x*).

(*o*) *Aldridge v. Johnson*, 7 E. & B. 885, *acc.*

(*p*) See *Godts v. Rose*, 17 C. B. 239.

(*q*) *Per Parke, B.*, in *Dixon v. Yates*, 5 B. & Ad. 340.

(*r*) *Mucklow v. Mangles*, 1 Taunt. 318. See *Atkinson v. Bell*, 8 B. & C. 277; *Laidler v. Burlinson*, 2 M. & W. 602; *Wilkins v. Bromhead*, 6 M. & G. 963.

(*s*) *Woods v. Russell*, 5 B. & Ald. 947; *Clark v. Spence*, 4 A. & E. 448.

(*t*) *Wood v. Bell*, 5 E. & B. 772; 6 E. & B. 355 (in error).

(*u*) *Per Holt, C. J.*, in *Langford v. Administratrix of Tiler*, Salk. 113.

(*x*) *Noy's Maxims*, 88, recognized in *Hinde v. Whitehouse*, 7 East, 571.

After condemnation of goods in the Exchequer, the property is altered, so as that neither trespass nor trover will lie for the proprietor against the person who seized them (z). By the Mercantile Law Amendment Act, (19 & 20 Vict. c. 97,) s. 1, no writ of *fi. fa.*, or attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person, *bond fide* and for valuable consideration, *before* the actual seizure; provided such person has not at the time of his title accruing, notice of the delivery of the writ to the sheriff.

When goods are sold, if anything remain to be done on the part of the seller, as between him and the buyer (a), to ascertain the price, quantity (b), or individuality (c) of the goods, before the commodity purchased is to be delivered, a complete present right of property does not generally attach in the buyer, and consequently, trover is not maintainable. The plaintiff purchased of the defendant a quantity of starch, which was lying at the warehouse of a third person, at so much per cwt., by bill at two months, for the delivery of which, fourteen days were to be allowed; the weight not having been ascertained at the time of purchase, the defendant gave, according to the usual mode, a note to the warehouse-keeper to *weigh and deliver* all his (the defendant's) starch. By virtue of this order, a partial weighing and delivery of several quantities of the starch took place. Trover having been brought for the remainder, which was unweighed and not delivered: it was held, that the action could not be supported; although it was contended, on the part of the plaintiff, that a delivery of part of an entire quantity of goods contracted for was a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, although the price for the same should not have been paid (d); and *per Cur.*, "Without deciding what might be the legal effect of such part delivery, in a case where the payment of price was the only act necessary to be performed, in order to vest the property; in this case, another act was necessary to precede both payment of price and delivery of the goods bargained for, *viz.*, weighing.—The weighing, which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought" (e).

(z) *Elkins v. Smith*, cited in *Scott v. Shearman*, 2 Bl. R. 981.

(a) *Whitehouse v. Frost*, 12 East, 614. But see *Smith's Merc. Law*, 493 (6th ed.), where this case is doubted, and it seems difficult to understand how the seller, as was decided in that case, can transfer property which had not completely vested in him. See cases in note (c).

(b) *Wallace v. Breeds*, 13 East, 522.

(c) *Busk v. Davis*, 2 M. & S. 397. See *White v. Wilks*, 5 Taunt. 176; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyss*, Holt, 18; *Abington v. Lipscombe*, 1 Q. B. 776.

(d) *Hanson v. Meyer*, 6 East, 614. See *Zagury v. Furnell*, 2 Campb. 240.

(e) *Tansley v. Turner*, 2 B. N. C. 151, *acc.*

Generally the legal effect of part delivery and acceptance will depend upon the intention of the parties. In those cases where it is in the power of the buyer at the time to take the whole, it will depend on his intention in accepting such part. When a part is taken with the intention to take possession of the whole, not to separate such part from the remainder, the delivery taking place in the course of the delivery of the whole, then such partial delivery and acceptance has the legal effect of an actual delivery and acceptance of the whole (*f*).

Where everything has been done by the sellers which they contracted to do, the property will in many cases pass to the buyers, although the goods still continue in the possession of the sellers. As where turpentine in casks was sold by auction at so much per cwt., and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest, before they were delivered to the purchasers, on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers, at the time of the sale, and the remainder within thirty days, on the goods being delivered; and the buyers had the option of keeping the goods in the warehouse, at the charge of the seller, for those thirty days, after which they were to pay the rent; and the buyers having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out, in order to enable the custom-house officer to gauge them; but before he could fill up the rest, a fire consumed the whole, in the warehouse, within the thirty days. It was held, that the property passed to the buyers in all the casks which were filled up, because nothing further remained to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. But the property in the casks not filled up remained in the seller, at whose risk they continued (*g*). So where the oats in a particular bin, which contained nothing else, were sold, and a bill for the price was accepted at the time of the sale; it was held, that the property vested in the buyer, for nothing remained to be done for the purpose of ascertaining the identity or quantity of the goods (*h*). So where a vendor has recognised the right of his vendee to dispose of goods remaining in the actual possession of the vendor, he cannot defeat the right of

but the principle seems to be the same in both cases.

(*g*) *Rugg v. Minett*, 11 East, 210.

(*h*) *Swanwick v. Sothorn*, 9 A. & E. 895.

(*f*) *Tanner v. Sewell*, 14 M. & W. 36; *Bolton v. Lancashire and Yorkshire Railway*, L. R. 1, C. P. 440; 1 Smith's Leading Cases, 736. These cases had reference to the right to stop in transitu,

a person claiming under the vendée on the ground that no property passed to the latter by reason of the want of a specific appropriation of the goods (*i*), or by reason of the goods having not been weighed.

Special Property.—A special property is, where he who has the possession of goods, holds them subject to the claims of other persons (*k*). “The immediate right to real property must be vested in one person only,” [or in several persons in the same right;] “whereas a special property, in the case of personalty, may be in one, as in the instance of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons, the right of the latter must prevail; but as against all other persons a special property is sufficient.” *Per Lord Kenyon*, C. J., S. C. Such a property therefore is sufficient to enable a person to maintain trover against a stranger (*l*). Hence this action may be brought:—By a bailee (*m*): By a carrier (*n*): By lessee for life against a stranger, who takes away the timber of a house which has been blown down, for the lessee for life has a special property to make use of the timber (as if he would rebuild), though the general property be in the reversioner (*o*): By a lord who seizes an estray or wreck, against a stranger, before the year and day are expired (*p*): By a sheriff against a person who takes away goods (which have been seized by the sheriff in execution,) before they are sold (*q*). So a party purchasing goods distrained may maintain trover, though the distress be irregular (*r*). So a person who has a special property in goods, coupled with the right of possession, may maintain an action against the absolute owner (*s*).

In addition to these instances of special property, it is to be observed, that there may be special property without possession, or there may be special property arising simply out of a lawful possession, and which ceases when the true owner appears: as where a chimney-sweeper's boy having found a jewel, carried it to a goldsmith, to be informed what it was, who refused to return it; it was held, that though the boy did not by such finding acquire an absolute property in the jewel, yet he had such a property as would enable him to keep it against all persons except the rightful owner, and consequently that he might maintain trover for it against the gold-

(*i*) *Hawes v. Watson*, 2 B. & C. 546; *Woodley v. Coventry*, 32 L. J., Ex. 185.

(*k*) *Per Lawrence, J.*, in *Webb v. Fox*, 7 T. R. 398.

(*l*) See *Jeffries v. Great Western Railway*, 5 E. & B. 802.

(*m*) Bro. Trespass, 92; *Arnold v. Jefferson*, Lord Raym. 275.

(*n*) *Goodwin v. Richardson*, 1 Roll. Abr. 4, (1) pl. 1.

(*o*) *Per Powell, J.*, Bull. N. P. 33.

(*p*) *Sir W. Courteney's case*, Bull. N. P. 33.

(*q*) *Wilbraham v. Snow*, 2 Wms. Saund. 47.

(*r*) *Lyon v. Weldon*, 2 Bingh. 334.

(*s*) *Brierly v. Kendall*, 17 Q. B. 943; *Turner v. Hardcastle*, 31 L. J., C. P. 193.

smith, who was a wrong-doer (*t*). So a possession under the rightful owner is sufficient against a person having no colour of right. The plaintiff bought and paid for a ship stranded on the coast, but not having complied with the regulations of the Register Acts the transfer was void. He endeavoured for several days to get the ship off, but without success, and at length she went to pieces. The defendant having possessed himself of parts of the wreck which had drifted on his farm; it was held, that the plaintiff had sufficient property in him to enable him to maintain trover against a wrong-doer; for as far as regarded the possession of the plaintiff, it was good against all except the vendor; and although the plaintiff had no absolute property as against the vendor, yet he claimed under him, and had the possession against those who tortiously took the goods without colour of right (*u*). So where K., the owner of furniture, lent it to the plaintiff under the terms of a written agreement, and the plaintiff placed it in a house occupied by the wife of C., a bankrupt; C.'s assignees having seized the furniture; it was held, that the plaintiff might maintain trover without producing the agreement (*x*). In the case of a simple bailment of a chattel without reward, it may be recovered either by the bailor or the bailee, if taken wrongfully out of the bailee's possession (*y*). A married woman living apart from her husband, on her death-bed gave certain chattels to plaintiff, who took possession of them, but left them in the house of the defendant, who sold them. It was held, that the plaintiff was entitled to bring trover, as he had sufficient property and possession against all the world except the husband (*z*).

There is one case in which a temporary property merely has been held sufficient to maintain trover. As where defendant, having agreed to sell the plaintiff an estate with the usual proviso, that in case the vendor could not make a title, the contract should be void, delivered to the plaintiff an abstract of the title. The plaintiff laid this abstract before counsel, and having received it back with an opinion written at the foot, and several queries in the margin, he left it with the defendant, requesting him to copy the opinion and marginal observations, and return the abstract as soon as he had copied them. After the plaintiff had several times in vain applied to have the abstract returned, he at length made a formal demand of it, when the defendant refused to re-deliver it, observing, that as he had been unable to clear up the objections of the plaintiff's counsel, the abstract would be useless to the plaintiff. The plaintiff having brought an action of trover for the abstract; it was held, that he was entitled to recover; *Chambre, J.*, observ-

(*t*) *Armory v. Delamirie*, 1 Str. 505.

(*u*) *Sutton v. Buck*, 2 Taunt. 302.

(*x*) *Burton v. Hughes*, 2 Bingh. 173.

(*y*) *Nicolls v. Bastard*, 2 C. M. & R.

659. *Acc. in trespass, Lotan v. Cross*, 2 Campb. 465.

(*z*) *Bourne v. Fosbrooke*, 18 C. B. N S. 515; 34 L. J., C. P. 164.

ing, that as to the general property in the abstract, while the contract is open, it is neither in the vendor nor in the vendee absolutely, but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title (a).

Trover will lie for bills of exchange indorsed to an agent of the plaintiffs, or order, *for their account*, and deposited with the defendants, by such agent, as a security for past and future advances by the defendants to him; for such indorsement is sufficient notice to the defendant that the agent had no property in the bills (b). So where a bill in the hands of A. for a specific purpose was indorsed by him to B. for valuable consideration, but in contravention of that purpose, and A. gave B. notice previously to the indorsement, that he had no authority to part with it, it was held, that the owner of the bill might maintain trover against B. (c).

2. *Right of Possession*.—The plaintiff must not only have a right of property but a right of possession also, and unless both these rights concur, the action will not lie.

“If goods” (*i. e.* specific goods) “are sold on credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest in him at once” (d). But default of payment at the termination of the credit does not rescind the contract; and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such goods; for in sales of goods, time is not of the essence of the contract, unless it is made so by express agreement (e). And so where goods (*i. e.* specific goods) are sold, and nothing is said as to the time of delivery or time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, and the seller is liable to deliver them, whenever they are demanded, *upon payment* (or tender) *of the price* (f); for the right of possession does not vest till then. So where goods were sold by auction, to be removed *and paid for* within a limited time, and if not removed at the end of that time warehouse-rent was to be charged; it was held, that the property in the goods vested

(a) *Roberts v. Wyatt*, 2 Taunt. 268.

(b) *Treuttel v. Barandon*, 8 Taunt. 100.

(c) *Evans v. Kymer*, 1 B. & Ad. 535. See *Foster v. Pearson*, 2 C. M. & R. 849; *Robson v. Rolls*, 1 M. & Rob. 239, *post*, p. 1302.

(d) *Per Bayley, J., Bloxam v. Sanders*, 4 B. & C. 948.

(e) *Martindale v. Smith*, 1 Q. B. 339; *Wilmhurst v. Bowker*, 7 M. & G. 882, *post*, p. 1390.

(f) *Per Bayley, J., Bloxam v. Sanders*, 4 B. & C. 948.

absolutely in the purchaser, from the moment of the sale, and that he was liable for the price in an action for *goods* sold, although they had been destroyed by fire (*g*). It is clear, however, that he could not have maintained an action of *trover* for them, had they continued in specie, without payment or tender of the price. And so where goods were sold, to be paid for by instalments, the balance to be paid before removal, and the vendor allowed the vendee to place the goods under lock and key, upon his (the vendor's) premises, himself retaining the key of the external inclosure: it was held, that, the balance being unpaid, the vendee had not such a right of possession (*h*) as would enable him to maintain *trover* against the vendor, upon a wrongful removal and sale of the goods (*i*). So where goods were assigned by A., a debtor, to B., his creditor, with a proviso for redemption on payment of the debt by A. to B. *on demand*, and that A. should continue in possession till default, and *before* any demand made by B., the goods were seized by the sheriff under a *fi. fa.*, it was held, that B. had not such a right of immediate possession as to entitle him to maintain *trover* against the sheriff (*k*). So where a person leased a house with the furniture therein, to another for a certain time, and during the term the furniture was wrongfully taken in execution by the sheriff; it was held, that the landlord could not maintain *trover* against the sheriff for the value of the furniture, because the landlord had not the right of possession during the demise; the tenant's property and interest did not determine by the sheriff's trespass; the tenant might have maintained trespass against the wrong-doer, and recovered damages (*l*).

It is to be remarked, that in the foregoing cases, the goods removed were personal chattels, and at the time of the seizure continued to be in the qualified possession of the tenant, which the lessor agreed he should have. But where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he without permission of his landlord severed the machinery from the mill; and it was afterwards seized under a *fi. fa.* by the sheriff, and sold by him; it was held, that no property passed to the vendee, and that the landlord was entitled to bring *trover* for the machinery, even during the continuance of the term, for the machinery being annexed to the mill formed part of the inheritance, and when wrongfully severed became the property of the reversioner (*m*). It is to be observed also, that where the bailee of goods,

(*g*) *Phillimore v. Barry*, 1 Campb. 513.

(*h*) The right of property would be in him, *Tarling v. Baxter*, 6 B. & C. 360.

(*i*) *Milgate v. Kebble*, 3 M. & G. 100.

(*k*) *Bradley v. Copley*, 1 C. B. 685. The mortgagor, therefore, may sue a wrongdoer in such a case; *per Lord*

Campbell, C. J., *Brierley v. Kendall*, 17 Q. B. 943.

(*l*) *Gordon v. Harper*, 7 T. R. 9. *Acc. Pain v. Whittaker*, 1 Ry. & M. 99; *Fraser v. Swansea Canal*, 1 A. & E. 354.

(*m*) *Farrant v. Thompson*, 5 B. & Ald. 826.

whether for a time certain or at will, misuses them, by treating them in a manner inconsistent with the bailment, as by selling them (*n*) (*a fortiori*, therefore, if he destroys them (*o*),) the bailment is determined; and the possessory title reverts to the bailor, and entitles him to maintain trover either against the bailee, or a *bond fide* purchaser (*p*).

A., a hop merchant, on several days in August, sold to B., by contract, various parcels of hops; part of them were weighed, and an account of the weights together with samples delivered to the vendee. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time; whereupon A. gave him notice, that unless they were paid for by a certain day, they would be resold. The hops were not paid for, and A. resold a part with the consent of B., who afterwards became a bankrupt, and then A. sold the residue of the hops, without the assent of B. or his assignees. Account sales of the hops so sold were delivered to B., in which he was charged warehouse-rent from the 30th of August. The assignees of B. demanded the hops of A., and tendered the warehouse-rent, charges, &c., and, A. having refused to deliver to them, brought trover. The jury found that the defendant had not rescinded the contract of sale. It was held, that the assignees were not entitled to maintain trover to recover the value of the hops; inasmuch, as the party must have not only a right of property, but a right of possession; and that although a vendee of goods acquires a right of property by the contract of sale (see *ante*, p. 1288), yet he does not acquire a right of possession to the goods, until he pays or tenders the price (*q*). So where the defendant sold to the plaintiffs wheat, for which the plaintiffs were to pay by a draft on a London banker: the defendants delivered the wheat to a carrier, and sent the bill of lading to the plaintiffs, but took the wheat again, and sold it before it came to the plaintiffs' possession, because the plaintiffs failed to send a draft on a London banker; it was held, that the plaintiffs could not sue the defendants in trover for the wheat (*r*). It was afterwards held, that the defendants would not be justified in such a case, in preventing the delivery of the wheat, unless the remitting of a banker's draft in payment were made by the contract, a condition precedent to the vesting of the property in the wheat in the plaintiffs (*s*).

A holder of scrip certificates for shares borrowed of B. a sum of money on his own promissory note, payable on demand, depositing the certificates as security. A. became bankrupt, and B., without having demanded payment of the bill, sold the shares. It was

(*n*) *Cooper v. Willomatt*, 1 C. B. 672.

(*o*) Co. Litt. 71, a.

(*p*) *Fenn v. Bittleston*, 7 Ex. 152.

(*q*) *Bloxam v. Sanders*, 4 B. & C. 941.
Acc. Milgate v. Kibble, 3 M. & G. 100.

See *Miles v. Gorton*, 2 C. & M. 504.

(*r*) *Wilmshurst v. Bowker*, 5 B. N. C. 541; 7 M. & G. 882 (*in error*).

(*s*) *Key v. Cotesworth*, 7 Ex. 595, *acc.*

held, that A.'s assignee was not entitled to maintain trover against B., as the immediate right to the possession of the shares was not re-vested in A. by the sale (t).

The right of possession is sufficient without having had actual possession (u). Hence, where in trover the plaintiff, as executor, declared upon the possession of his testator, it was held to be sufficient; because the personal property of the testator was vested in the executor; and no other person having a right to the possession, the property drew after it the possession in law (v). So if A. be indebted to C., and B. indebted to A., and it is agreed between them that B. shall deliver goods to C., in satisfaction of the debt due from A. to C., and B. afterwards converts the goods to his own use, C. may maintain trover against B., though C. never had possession; for by the agreement the right was in C., and the conversion is a wrong done to him (x).

3. *Personal Goods*.—The subject-matter of this action is confined to *personal* goods. Hence trover will not lie for things fixed to the freehold (y). But where general damages were assessed on a declaration in trover for goods, chattels and *fixtures* (enumerating, among other merely moveable articles, stoves, shelves, cupboards, &c.), it was held, that the word "*fixtures*" would not necessarily mean things affixed to the freehold, and that judgment ought not to be arrested (z). Questions respecting the right of what are ordinarily called *fixtures* principally arise between three classes of persons (a).

1st. Between different descriptions of representatives of the same owner of the inheritance, *viz.* between the heir and executor. In this case, the rule obtains with the utmost rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed to the freehold or inheritance (b). There is no exception, it seems, in this case in favour of trade fixtures erected by the owner of the land for the more beneficial enjoyment of it (c).

2ndly. Between the executor of tenant for life, or in tail, and the remainderman or reversioner; in which case the right to fixtures

(t) *Halliday v. Holgate*, L. R., 3 Ex. 229, (in error); 37 L. J., C. P. 174. See too *Donald v. Suckling*, L. R., 1 Q. B. 585. In both these cases the difference between a lien and a pledge is pointed out in the judgments.

(u) See as to the difference between trespass and trover in this respect the remarks of *Patteson, J.*, in *Balme v. Hutton*, 1 C. & M. 270, commented upon and explained in *Tharpe v. Stallwood*, 5 M. & G. 760.

(v) *Hudson v. Hudson*, Latch. 214, cited 7 T. R. 13.

(x) *Flewelling v. Rave*, 1 Bulst. 68, cited in Bull. N. P. 35.

(y) *Minshall v. Lloyd*, 2 M. & W. 450.

(z) *Sheen v. Rickie*, 5 M. & W. 175.

(a) *Per Lord Ellenborough, C. J.*, in *Elwes v. Maw*, 3 East, 51.

(b) *Ibid.*

(c) *Fisher v. Dixon*, 12 Cl. & F. 312.

is considered more favourably for executors than in the preceding case between the heir and executor (*d*).

“In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor as between the executor and the heir, or between the executor and the person in remainder, the court, in the three principal cases on this subject, *viz. Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Ambler, 113, which were cases of fire-engines to work a colliery, erected by the tenant for life; before Lord *Hardwicke*; and *Lawton v. Salmon*, 1 H. Bl. 259, *in notis*, before Lord *Mansfield*, which was the case of salt-pans, and which came on in the shape of an action of trover, brought for the salt-pans, by the executor against the tenant of the heir at law, the court may be considered as having decided mainly on this ground, that *where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle,) was an accessory to a matter of a personal nature, that it should be itself considered as personality*. The fire-engine, in the cases in Atk. and Ambler, was an accessory to the carrying on the trade of getting and vending coals, a matter of a personal nature. Lord *Hardwicke* says, in the case in Ambler, ‘A colliery is not only an enjoyment of the estate, but in part carrying on a trade.’ And in the case in Atk. he says, ‘One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers.’ Upon the same principle, Lord C. B. *Comyns* may be considered as having decided (*e*), that a cider-mill should go to the executor and not to the heir, *i. e.* as a mixed case between enjoying the profits of the land, and carrying on a species of trade, and as considering the cider-mill as properly an accessory to the trade of making cider. In the case of the salt-pans, Lord *Mansfield* does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, ‘*The salt-spring is a valuable inheritance, but no profit arises from it, unless there be a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance*’ (*f*). Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of

(*d*) Per Lord *Ellenborough*, C. J., in *Elwes v. Maw*, 3 East, 51.

(*e*) In a case cited in *Lawton v. Lawton*, 3 Atk. 13, 16.

(*f*) That if the salt springs had been

let, and the tenant had erected the salt pans, it would be different; see *Earl of Mansfield v. Blackburne*, 6 B. N. C. 439.

carrying on a trade." *Per* Lord *Ellenborough*, C. J., delivering the opinion of the court in *Elwes v. Maw*, 3 East, 53, 54. In trover, by the executor against the heir, *Lee*, C. J., held, that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir (*g*). But as remarked by Mr. Smith, in his notes to *Elwes v. Maw*, 2 Lead. Ca., these articles seem to have been rather chattels than fixtures, properly so called. Standing corn belongs to a devisee of the land, and not to the executor (*h*); but a legatee of goods and stock on the farm shall take it from both (*i*). It is agreed, however, that as between the executor and the heir, if there be not any devisee of the land, the executor is entitled to standing corn (*j*).

The 3rd case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant.

It is a general rule, that where a lessee having annexed any personal chattel to the freehold during his term, afterwards takes it away, it is waste (*k*). And so a lessee cannot even *during* the term maintain trover for fixtures *remaining affixed* to the freehold; for the principle of law is, that whatsoever is planted in the soil, belongs to the soil, *quicquid plantatur solo, solo cedit*; and though the tenant has a right to remove fixtures of a certain kind during his term or during what may, for this purpose, be considered as an excrescence on his term (see *post*, p. 1295), they are not goods and chattels at all, but parcel of the freehold, and as such, not recoverable in trover (*l*) until severed. Thus trover will not lie by the tenant after the expiration of the term for bells, even though the landlord has subsequently severed them (*m*). Nor will it lie after the expiration of the term for a ladder and crane, fastened with nails or screws to the floor and joists above in the usual way, or for a bench fixed to the wall, although they might be removed without injury to the freehold (*n*). Nor can a tenant, after the expiration of the term, or (*semble*) during the term, unless he be a gardener by trade, remove a border of box planted on the demised premises by himself (*o*). The fixtures in these cases, it will be observed, come within Lord *Ellenborough's* rule of being "for the benefit of the inheritance," or, to use the language of *Parke*, B., in *Hellarwell v. Eastwood*, "for the permanent and substantial improvement of the dwelling" (*p*).

(*g*) *Harvey v. Harvey*, Str. 1141.

(*h*) *Spencer's case*, Harg. Co. Litt. 55, b. n. (2).

(*i*) *West v. Moore*, 8 East, 339.

(*j*) Harg. Co. Litt. 55, b. n. (2).

(*k*) *Per* Lord *Ellenborough*, C. J., 3 East, 51.

(*l*) *Mackintosh v. Trotter*, 3 M. & W. 184.

(*m*) *Lyde v. Russell*, 1 B. & Ad. 394.

(*n*) *Wilde v. Waters*, 16 C. B. 637.

(*o*) *Empson v. Soden*, 4 B. & Ad. 655.

(*p*) See *Buckland v. Butterfield*, 2 B. & B. 54, *post*, 1294.

A barn erected by the tenant upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, may be removed (*q*). So where certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant; it was held, that these were the goods and chattels of the outgoing tenant, for which he might maintain trover (*r*). But these cases are not properly cases of fixtures at all, but of mere personal chattels, for which trover will lie, either before the expiration of the term or after (*s*).

On the above rule, however, some exceptions have been engrafted; 1st, in favour of utensils set up in relation to trade; 2nd, of matters of ornament (*t*), furniture, &c., as pier-glasses, hangings (*u*), cornices (*x*), a wainscot fixed only by screws, or marble (*i.e.* *ornamental* marble (*y*)) chimney-pieces (*z*); a pump erected by the tenant and slightly affixed, so as to be capable of being removed entire (*a*), &c. "Things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; on the other hand, there may be that sort of fixing or annexation which, though the thing annexed may have been merely for ornament, will yet make the removal of it waste." *Per Dallas*, C. J. (*b*).

The exception relating to trade fixtures was established in *Poole's* case, 1 Salk. 368, has frequently been confirmed since; and the present inclination of the courts is to extend it still further. "Where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle) is an accessory to a matter of a personal nature, it is itself considered as personalty." *Per Lord Ellenborough*, C. J., in *Elwes v. Maw*, 3 East, 53. Thus the question, whether a pile of wood driven into the bed of the Thames, and which was used by the plaintiff to fasten his barges to, was the property of the plaintiff or of the crown to whom the bed of the river belonged, was de-

(*q*) *Culling v. Tuffnall*, Bull. N. P. 34.

(*r*) *Davis v. Jones*, 2 B. & Ald. 165.

(*s*) *Davis v. Jones* was decided expressly on this ground (see *per Parke*, B., in *Minshall v. Lloyd*, 2 M. & W. 460); and in *Wansborough v. Maton*, 4 A. & E. 884, where the facts were similar to those in *Culling v. Tuffnall*, except that the supports of the barn in the former case were let into the ground, the barn resting upon them (as in *Culling v. Tuffnall*) by its own weight alone; the action was brought after the expiration of the term, and it was held, that it would lie. See *Wiltshire v. Cottrell*, 1 E. & B. 674; *Hellawell v. Eastwood*, 6

Ex. 312.

(*t*) *Penton v. Robart*, 2 East, 88; *Wilde v. Waters*, 16 C. B. 637; which is a question of fact for the jury; *Leach v. Thomas*, 7 C. & P. 327.

(*u*) *Beck v. Rebow*, 1 P. Wms. 94.

(*x*) See *Avery v. Cheslyn*, 3 A. & E. 75.

(*y*) *Bishop v. Elliott*, 11 Ex. 113.

(*z*) *Per Lord Hardwicke*, C., *Lawton v. Lawton*, 3 Atk. 15; which would have been waste in the time of Henry VII. *Herlakenden's case*, 4 Rep. 64.

(*a*) *Grymes v. Boweren*, 6 Bingh. 437.

(*b*) *Buckland v. Butterfield*, 2 B. & B. 54, post, p. 1296.

cided in the plaintiff's favour (c). In *Hellawell v. Eastwood*, 6 Ex. 295, the principle was carried still further, and it was held, that cotton "mules" fixed by means of screws, some into the wooden floors of a cotton mill, and some by being sunk into the stone flooring and secured by molten lead, were not fixtures removable during the term only, but *chattels*, and as such, distrainable for rent. "The only question," said *Parke*, B., in delivering the judgment of the court, "is whether the machines, when fixed, were parcel of the freehold. And this is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can be easily removed, *intégrè, salvè, et commodè*, or not, without injury to itself or the fabric of the building; secondly, on the *object and purpose of the annexation*, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*" (d).

The above exceptions, it must be observed, are subject to these two limitations: 1st. That the articles be removed during the original term or during such further period of possession by the tenant, as he holds the premises under a right still to consider himself as tenant (e); and it makes no difference that the tenant has not evinced an intention to abandon his right to such fixtures, if his tenancy has in fact determined (f). Thus, where the defendant allowed a judgment by default in ejectment to be signed against him on 19th of February, on the plaintiff agreeing not to execute a writ of possession before the 25th of March; it was held, that the tenant was not entitled to remove fixtures between those dates (g). So where the tenant, on quitting, left, by the landlord's permission, some fixtures (unsevered) on the premises, with the hope that the incoming tenant would purchase them (h). If the tenant does not remove them during the term, or such further period as above mentioned, they become the property of the landlord (i). "During the term the tenant may take away chimney-pieces (*i. e.* ornamental ones, *ante*, p. 1294), and even wainscot, which is a very strong case, but not after the term; if he did, he would be a trespasser;" *per* Lord *Hardwicke*, C., *ex parte Quincy*, 1 Atk. 477. But a tenant cannot remove a building (not com-

(c) *Lancaster v. Eve*, 7 C. B. (N. S.) 717.

(d) *Waterfall v. Penistone*, 6 E. & B. 876, and *Trappes v. Harter*, 2 C. & M. 153, *acc.*

(e) *Weeton v. Woodcock*, 7 M. & W. 14. The tenant's mortgagee has the same right, as to fixtures erected before the

mortgage. *Hitchman v. Walton*, 4 M. & W. 409.

(f) *Leader v. Homerwood*, 27 L. J., C. P. 316.

(g) *Heap v. Barton*, 12 C. B. 274.

(h) *Roffey v. Henderson*, 17 Q. B. 574.

(i) *Lyde v. Russell*, 1 B. & Ad. 394.

pletely finished at the expiration of the term) which he has erected principally with timber given to him for that purpose by his landlord (*k*).

2nd. That the articles can be removed without substantial injury to the freehold (*l*). "The principal," said Lord *Hardwicke*, in *Lawton v. Lawton*, "shall not be destroyed by the accessory." Thus, a conservatory attached to a house, and communicating with it by windows opening into it, and which, if removed, would have left one side of the house exposed to the weather, was held not removable by the assignees (in bankruptcy) of the tenant who had erected it (*m*).

The exception with regard to buildings erected for the purposes of trade, was held, in *Elwes v. Maw*, 3 East, 38, not to extend to erections constructed by the tenant for the ordinary purposes of husbandry. Lord *Kenyon*, indeed, seems to have been of a contrary opinion (*n*); and Mr. Amos, in his work on Fixtures (*o*), controverts with much force the doctrine of Lord *Ellenborough* in the above case (*p*). Now by 14 & 15 Vict. c. 25, s. 3,—If any tenant of a farm or lands shall, with the consent of his landlord and at his own expense, erect any farm buildings, engine or machinery, either for agricultural purposes, or for the purposes of trade and agriculture mixed (which shall not have been erected in pursuance of some obligation), such buildings, &c. shall be the property of the tenant and removable, notwithstanding they be permanently fixed to the soil, so as the tenant making such removal do not injure the land or buildings of the landlord, or otherwise puts them in as good plight as they were in before the erection of the buildings, &c. But the tenant, before he is entitled to remove the buildings, &c. must first give a month's notice in writing to the landlord or his agent; who may then elect to purchase the same, upon which the right to remove the buildings, &c. is to cease, and the same are to belong to the landlord.

The above principles do not, of course, apply where the tenant has not himself erected the fixtures (*q*); or, generally, where parties have entered into an express agreement with regard to them. A covenant by a tenant, to yield up in repair, at the expiration of his lease, all buildings which should be erected during the term, upon the demised premises, includes buildings erected and used by the tenant for the purpose of trade and manufacture, if such buildings be let into the soil or otherwise fixed to the freehold, but not

(*k*) *Smith v. Render*, 27 L. J., Ex. 83.

(*l*) *Avery v. Cheslyn*, 3 A. & E. 75; *Hellawell v. Eastwood*, 6 Exch. 312.

(*m*) *Buckland v. Butterfield*, 2 B. & B. 54.

(*n*) *Dean v. Allaley*, 3 Esp. 11.

(*o*) 2nd ed., p. 56, *et seq.*

(*p*) And see 2 *Smith's Lead. Ca.* 99, *in notis.* The distinction, however, is confirmed by *Wiltshire v. Cottrell*, 1 E. & B. 674.

(*q*) See *Winn v. Ingilby*, 5 B. & Ald. 625; *Wiltshire v. Cottrell*, 1 E. & B. 674.

where they merely rest upon blocks or pattens (r). A covenant to yield up at the expiration of the term all erections and *improvements* erected, made or set up during the term, is broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon walls, built for the purpose of receiving it, and imbedded in mortar thereon (s); and a similar covenant was held (t) to extend to a pair of mill-stones; and to a plate-glass shop front (u). But a covenant to deliver up on the expiration of the term, "locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs, and other fixtures and articles in the nature of fixtures, &c.," was held not to extend to trade or tenant's fixtures, the articles specified comprising landlord's fixtures only (x).

If a landlord, under a distress for rent, sever fixtures from the freehold and dispose of them, he is liable in trover for the articles severed as goods and chattels; and it is not open to the defendant to contend that the distress is lawful, because the plaintiff has, by his declaration treated the fixtures as chattels; which may be distrained (y).

A fourth case, *viz.*, as between a preceding and succeeding incumbent, has been the subject of decision in a late case. A rector erected in the garden of the rectory, hothouses, about 70 feet long, and between 10 and 20 feet high. They consisted of a frame and glass-work resting on brick walls about two feet high, and imbedded in mortar on these walls, the glass-work sliding up and down on pulleys and not fixed. It was held, that this erection never ceased to be a chattel during the rector's life nor at his death, and, therefore, passed as part of his personal estate to his executors. "Any matter of needless expense," said Lord *Campbell*, C. J., in delivering the judgment of the court, "or luxury or ornament in which the present incumbent, to gratify his own taste, has indulged himself (blameably or not is immaterial), he is not only not bound, but he ought not, to transmit to his successor. If the successor may recover damages from the executors because such things have been removed by their testator, there can be no doubt he in his turn must maintain them, and what he must maintain he must also restore and rebuild when decayed by his fault, and so the benefice will become permanently saddled with a useless burthen, and an indefinite, it may be ruinous, expense. Hothouses, pinneries and conservatories do not in this respect differ from observatories, menageries or aviaries; they are equally what, in a provincial constitution of 1236, 21 Hen. III., cited in *Wise v. Metcalfe*

(r) *Naylor v. Collinge*, 1 Taunt. 19.

(s) *West v. Blakeway*, 2 M. & G. 729.

(t) *Martyr v. Bradley*, 9 Bing. 24.

(u) *Hastlett v. Burt*, 18 C. B. 893.

See *Stansfield v. Mayor of Portsmouth*, 27 L. J., C. P. 124.

(x) *Bishop v. Elliott*, 11 Exch. 113.

(y) *Dalton v. Whitem*, 3 Q. B. 961.

(10 B. & C. 314), are called *impensæ voluptuosæ*, as distinguished from *necessariæ* (z).

There is no doubt that, by a conveyance, whether to a purchaser or a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them (a). The owner of a freehold house, in which there were various fixtures, sold it by auction. Nothing was said about the fixtures. A conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house; it was held, that they passed by the conveyance of the freehold; and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them (b). A few articles which were not fixtures, were also left in the house: the demand described them, together with the other articles, as fixtures, and the refusal was of the *fixtures demanded*; it was held, that, upon this evidence, the plaintiff could not recover them in this action (c). The acceptance of a demise of a house containing fixtures does not raise an implied contract to pay for such fixtures (d). Where a lessee for years mortgaged his lease and all his estate and interest in the premises, and afterwards became bankrupt; it was held, that the mortgagee might declare in case, as reversioner, against the assignee of the tenant, for the removal of the fixtures from the premises, whereby they were injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures removed, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage; for, although there was a covenant in the original lease to the mortgagor to deliver up to the lessor at the determination of the term all fixtures and things to the premises belonging and to belong; yet, all the mortgagor's interest having passed to the mortgagee, the latter had a sufficient interest to maintain trover against a person who wrongfully removed them (e).

Trover may be maintained for an undivided part of a chattel, *e. g.*, three-fourths of a ship (f). A lessor cannot maintain an action of trover against the lessee to obtain possession of an indenture of lease, upon the expiration of the term, by forfeiture or otherwise (g).

4. *Conversion*.—It must appear that the defendant has been guilty of a wrongful conversion. The wrongful conversion by the defendant is considered as the gist of the action. If A. take the horse of B., and ride him, and after that deliver him to B., yet B.

(z) *Martin v. Roe*, 7 E. & B. 237.

(a) *Per Parke, B.*, in *Hitchman v. Walton*, 4 M. & W. 416. See *Wheeler v. Montefiore*, *per Lord Denman*, C. J., 2 Q. B. 142; *Trappes v. Harter*, 2 C. & M. 153.

(b) *Colegrave v. Dias Santos*, 2 B. & C. 76.

(c) *Colegrave v. Dias Santos*, 2 B. & C. 76; *Longstaff v. Meagoe*, 2 A. & E. 170, *acc.*

(d) *Goff v. Harris*, 5 M. & G. 573.

(e) *Hitchman v. Walton*, 4 M. & W. 409.

(f) *Watson v. King*, 4 Campb. 272.

(g) *Hall v. Ball*, 3 M. & G. 242.

may maintain trover against A., for the riding was a conversion, and the re-delivery will not bar the action, although it will go in mitigation of damages (*h*). Drawing out part of the liquor in a vessel, and filling it up with water, is a conversion of the liquor (*i*). But the mere taking away or destroying a part of the property which remains in the hands of a bailee, is not (*semble*) such a conversion that the owner may sue in trover for the whole (*k*). If A. find the goods of B., and upon demand of the goods, answer that he knows not whether B. is the true owner, and therefore refuses to deliver them; this is not evidence of a conversion, if A. keep them for the true owner (*l*). Where goods are deposited with a wharfinger, and the right to possession subsequently becomes changed by indorsement of the delivery warrant or otherwise, in case of an action of trover being brought against the wharfinger by the transferee, it is a question for the jury in deciding whether there has been a conversion to consider whether the wharfinger had a *bond fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed (*m*). The mere fact of a general attachment against all the goods of the depositor having been issued, and notice thereof delivered to the wharfinger, is not of itself sufficient to place the goods in the custody of the law, although it is a circumstance to be considered by the jury in forming a conclusion whether there has been a conversion (*n*). A demand and refusal is not evidence of conversion, unless the party upon whom the demand is made has at that time possession of the goods, and the means of delivering them up (*o*). Where the demand was of a gun (which had burst while in the possession of the bailee), in the same good plight as when the bailee received it, it was held, that the refusal of a demand so qualified was no evidence of a conversion (*p*).

“Assuming to oneself the property and right of disposing of another man’s goods is a conversion;” *per Holt*, C. J. (*q*). So a person is guilty of a conversion who takes the property of one person by assignment from another, who has not any authority to dispose of it (*r*); and it is not necessary in such case to prove a demand and refusal (*s*). A., a tobacco broker, purchased in his own name, for the plaintiff, some tobacco, which was then in the king’s warehouse, and afterwards pledged the same, in his own name, with the defendant, for a sum of

(*h*) *Countess of Rutland’s case*, 1 Roll. Abr. 5 (L.), pl. 1.

(*i*) *Richardson v. Atkinson*, 1 Str. 576.

(*k*) *Philpott v. Kelley*, 3 A. & E. 116.

(*l*) *Per Coke*, C. J., 2 Bulst. 312.

(*m*) *Per Parke*, B., *Vaughan v. Watt*, 6 M. & W. 977; *acc. Pillott v. Wilkinson*, 3 H. & C. 346 (*in error*).

(*n*) *Pillott v. Wilkinson*, 34 L. J., Ex.

22 (*in error*).

(*o*) *Edwards v. Hooper*, 11 M. & W. 363.

(*p*) *Rushworth v. Taylor*, 3 Q. B. 699.

(*q*) *Baldwin v. Cole*, 6 Mod. 212.

(*r*) *Hurst v. Gvennap*, 2 Sta. [306. See *Carlisle v. Garland*, 7 Bingh. 298; (*in error*) 2 C. & M. 31; *Robson v. Rolfs*, 1 M. & Rob. 239.

(*s*) *Blowam v. Hubbard*, 5 East, 407.

money, and transferred it into the defendant's name in the king's warehouse. The defendant was informed of the plaintiff's right to the tobacco, and was applied to, both by the plaintiff and the broker to deliver the same to the plaintiff, but the defendant refused to make the transfer, or to give an order for the delivery. It was held, that the acts of the defendant amounted to a conversion (*t*). If a principal ratifies the unauthorised purchase by his agent, of a chattel which the vendor had no right to sell, he is guilty of a conversion; although he had no knowledge of the circumstances which made the sale unlawful (*u*). So a servant may be guilty of a conversion, although the act be done by him for the benefit of his master; "for a person is guilty of a conversion, who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it (*w*).” But it is to be observed, that this was the case of an actual conversion by the servant. For where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company; it was held that this qualified refusal did not amount to a conversion of the goods by the defendant (*x*). And a servant is not, it seems, liable for handing over goods to his employers, unless he has previously received notice of the title of a third party to them (*y*).

The mere removal of a chattel, however, independent of any claim over it either in favour of the party himself or any one else, does not amount to a conversion (*z*). "Any asportation of a chattel for the use of the defendant or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion;" *per Alderson, B., S. C.* But "a simple asportation of a chattel, without any intention of making further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion;" *per Lord Abinger, C. B., S. C.* Where, therefore, C., to whose order goods were consigned, to be held at the disposal of A., the plaintiff's agent, landed and warehoused the goods, and paid the duty on them, and the wharfinger, without the knowledge of C., removed the goods to another warehouse, where they were accidentally

(*t*) *M'Combie v. Davies*, 6 East, 538.

(*u*) *Hilberry v. Hatton*, 2 H. & C. 822;
33 L. J., Ex. 190.

(*w*) *Stephens v. Elwall*, 4 M. & S. 259.

See *Cranch v. White*, 1 B. N. C. 414;
Davies v. Vernon, 6 Q. B. 443,

(*x*) *Alexander v. Southey*, 5 B. & Ald.
247.

(*y*) *Powell v. Hoyland*, 6 Ex. 67.

(*z*) *Fouldes v. Willoughby*, 8 M. & W.
540.

burnt; it was held that, the plaintiff could not maintain trover against C. (although the jury found that C. was not, as a prudent man, doing his best for the benefit of the owner, but that he acted with a view to his own profit); for as he had acted legally in clearing the goods, his motives did not make the act illegal (a). So where the plaintiff's servants were removing his goods from land, which the defendant had recovered in ejectment, and defendant on entering under the writ of possession turned the plaintiff's servants off the land and would not let them remove the goods; there having been no subsequent demand or refusal, it was held, that the jury might find there was no conversion (b).

In a case where the defendant had taken the plaintiff's boat for the purpose of assisting the plaintiff, and from a motive of kindness to him, and the boat was sunk in the endeavour, Lord *Ellenborough*, C. J., was of opinion, that the act of the defendant could not be deemed an illegal conversion (c). Trover will lie for the misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only (d).

With respect to negotiable instruments, *e. g.*, bank notes, possession is *prima facie* evidence of property; and persons holding them cannot, without strong evidence of fraud, be compelled by any prior holder, who may have been robbed, to disclose the manner in which they received them (e). "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder, with the bills, takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable; and in this respect they differ essentially from goods of which the property and possession may be in different persons" (f). An exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it deposited it at his banker's, who made him advances to the amount of the value. A. afterwards becoming bankrupt; it was held, that the owner of the exchequer bill could not maintain trover against the bankers, the property in such an exchequer bill, like bank-notes and bills of exchange indorsed in blank, passing by delivery (g). A banker discounted a bill drawn on a customer and accepted payable at his bank, after notice from the customer that it had been lost by the holder. He afterwards debited his customer with the amount of the bill, and wrote a discharge on it and delivered it up to the customer as his voucher of his account; it was held, that the banker was thereby

(a) *Heald v. Carey*, 11 C. B. 977.

(b) *Thorogood v. Robinson*, 6 Q. B. 769.

(c) *Drake v. Shorter*, 4 Esp. 165.

(d) *Devereux v. Barclay*, 2 B. & Ald. 702.

(e) *King v. Milsom*, 2 Campb. 5.

(f) *Per Eyre*, C. J., delivering judgment, *Collins v. Martin*, 1 B. & P. 651.

(g) *Wookey v. Pole*, 4 B. & Ald. 1. See *Brandao v. Barnett*, 3 C. B. 519.

guilty of a conversion, and that the loser of the bill might recover in trover without a previous demand (*h*). So where a person receives a bill for a certain purpose only, and transfers it in violation of that purpose, he is liable in trover (*i*). But if the authorization be to get the bill discounted and *apply the proceeds* in a particular manner, and the party to whom the bill is handed over for that purpose indorses it, but misapplies the proceeds, he is not liable in trover (for he has done nothing with the *bill* he was not authorized to do); but for money had and received only (*k*). A person having three bills of exchange, applied to a country banker, with whom he had not had any previous dealings, to give for them a bill on London of the same amount; this bill was afterwards dishonoured: it was held that as there was a complete exchange of securities trover would not lie for the three bills of exchange (*l*).

Although it appears formerly to have been doubted whether in the case of a tortious taking, the plaintiff was not confined to an action of trespass, yet it is now agreed, in such case, that the plaintiff has his election to bring either trespass or trover; for a tort may be qualified, though it cannot be increased (*m*).

If A. lodges jewels, sealed up, at a banker's for safe custody only, and the banker breaks open the box, and pawns the jewels to another; A. may maintain trover against the pawnee for the conversion of the jewels to his own use (*n*). In an action of trover for plate, it appeared that the plaintiff claimed under a remainderman, against the defendant, to whom it was pawned by the tenant for life. That I. S., by will, gave his plate to trustees, for the use of his wife, *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. That she afterwards pawned it with the defendant for a valuable consideration, who had no notice of the settlement; and before the commencement of this action she died. A demand and refusal was proved. After verdict for plaintiff, the court were of opinion, on a case reserved, that the defendant was bound to deliver up the plate, without being paid the money he had advanced on it; observing, that the point was clearly established, and the law must remain as it is, until the legislature thought fit to provide, that the possession of such chattels shall be a proof of ownership (*o*). By 1 Jac. I. c. 21, the sale of any goods wrongfully taken to any *pawnbroker* in London, or within two miles thereof, shall not alter the property. Hence, if goods stolen are pawned, the owner may maintain trover against the pawnbroker (*p*). So if a person who has no title to goods, (having previously transferred them by a bill of sale to a third

(*h*) *Lovell v. Martin*, 4 Taunt. 799.

(*i*) *Robson v. Rolls*, 1 M. & Rob. 239; *Atkins v. Owen*, 4 A. & E. 819. See ante, p. 1288.

(*k*) *Palmer v. Jarman*, 2 M. & W. 282.

(*l*) *Hornblower v. Proud*, 2 B. & Ald. 327.

(*m*) *Bishop v. Montague*, Cro. Jac. 50

(*n*) *Hartop v. Hoare*, 2 Str. 1187.

(*o*) *Hoare v. Parker*, 2 T. R. 376.

(*p*) *Packer v. Gillies*, 2 Campb. 336, n.

party), pledge them, the pawnbroker may (*semble*) set up the *jus tertii* in an action brought against him by the pledgor; for the real owner (the third party) may recover against him (*q*). And as he may show that the plaintiff never had any title, so he may show that the plaintiff's title has since determined, as by the appointment of an administrator since the bailment or pledge (*r*). A pawnbroker has no right, under the 39 & 40 Geo. III. c. 99, s. 17, to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner before sale tender him the principal and interest due (*s*). A pawnbroker, who, in taking pledges, omits to pursue the course required by s. 6, acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a bankrupt pawnor (*t*). But the section is complied with, if the pawnbroker inserts in the memorandum he delivers to the pawnor a statement of the matters specified in that section on the information of the pawnor, although such information be false, provided the insertion be made *bonâ fide* and in ignorance of its falseness (*u*).

If a tradesman sell goods to be paid for on delivery, and his servant, by mistake, delivers them without receiving the money he may, after demand and refusal to deliver or pay, bring trover for the goods against the purchaser (*x*). So where iron was to be delivered under a contract that certain bills outstanding against the plaintiff should be taken out of circulation, and after part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the further delivery, and brought trover for what had been delivered; it was held, that the action would lie (*y*).

If, upon an information of seizure, the goods be condemned, no action will lie for them. (*Ante*, p. 1251.) But if there be no condemnation, and the goods were not liable to be seized, trespass or trover will lie against the officer for them (*z*).

If the vendor of a leasehold estate delivers the conveyance as an escrow to take effect on payment of the residue of the purchase-money, the property in the title-deeds is so vested in the vendee, that the vendor obtaining possession of them and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money (*a*). And a vendor of land, who has made an absolute conveyance of the legal estate to the vendee, has no lien on the title-deeds for the unpaid purchase-money (*b*). When property in land passes by a deed, the property in the title deeds

(*q*) *Cheesman v. Exall*, 6 Ex. 341.

(*r*) *Thorne v. Tilbury*, 27 L. J., Ex. 407; *semble*, under the plea of "not possessed," *per Martin, B., S. C.*

(*s*) *Walters v. Smith*, 5 B. & Ald. 439.

(*t*) *Fergusson v. Norman*, 5 B. N. C. 76.

(*u*) *Attenborough v. London*, 8 Ex.

661.

(*x*) *Per Bayley, J.*, 2 B. & Ald. 329, n.

(*y*) *Bishop v. Shillito*, 2 B. & Ald. 329, n.

(*z*) *Tinkler v. Poole*, 5 Burr. 2657.

(*a*) *Hooper v. Ramsbottom*, 6 Taunt. 12.

(*b*) *Goode v. Burton*, 1 Ex. 189.

passes with it (c). Thus the mortgagee in fee may sue a third party, with whom the mortgagor has deposited the title-deeds as a security for advances (d). An estate was conveyed in 1803, by J. B. to W. H., who, in 1812, conveyed it to A. H., by whom it was sold in 1826 to the plaintiff. The first vendor did not deliver up the title-deeds. In 1824 he was sued by A. H., the then owner of the estate, for the deeds, and a verdict was recovered against him, but the judgment was not docketed. The first vendor absconded, and in 1825 obtained a sum of money as on a mortgage of the estate from one of the defendants, with whom he deposited the deeds. On trover brought in 1829, after demand and refusal; it was held, that the plaintiff, being the legal owner of the estate, might recover the deed from the mortgagee without tendering the mortgage-money (e). By a postnuptial contract, B. conveyed to plaintiffs, as trustees for his wife, property, the title-deeds of which he obtained from the trustees, and deposited with the defendants as a security for money advanced; it was held, that the plaintiffs were entitled to maintain trover for the deeds; for, upon the deposit, the defendant acquired no more than a right to go into a court of equity to compel a legal conveyance (f), and such right did not constitute the defendants purchasers within the 27 Eliz. c. 4, s. 2, which enacts, "that every conveyance of land made for the intent to defraud such persons as have purchased in fee simple, fee tail, for lives, or years, the same land so formally conveyed, shall be deemed to be utterly void" (g). A lessor cannot maintain trover against his lessee for an expired or forfeited lease (h). On the rescission of a contract for the sale of land, the vendee, who has prepared the deed of conveyance at his own expense, may maintain trover for it (i).

As the master of a ship has no general authority by law, in the absence of his employers, to *sell* the ship entrusted to his care, but only an implied authority to act for the benefit of the concern, exercising a sound discretion, such as the owner himself would exercise if he were upon the spot, it follows, that the owner of a ship may recover in an action of trover from a vendee claiming by purchase from the master, unless the vendee can show that the ship was sold by the master under such an urgent necessity as would have induced the owner to have sold the ship if he had been present (k); as where the ship was totally wrecked, and a large part of the cargo damaged, in a distant country (l). So, the captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and, therefore, where, in the course of a voyage from India, the ship was wrecked off the Cape of Good Hope, and some

(c) *Lord v. Wardle*, 3 B. N. C. 680.

(d) *Newton v. Beck*, 27 L. J., Ex. 176.

But see *Davies v. Vernon*, 6 Q. B. 443.

(e) *Harrington v. Price*, 3 B. & Ad. 170.

(f) See *Lister v. Turner*, 15 L. J.,

Ch. 336.

(g) *Kerrison v. Dorrien*, 9 Bing. 76.

(h) *Hall v. Ball*, 3 M. & G. 242.

(i) *Esdaille v. Oxenham*, 3 B. & C. 225.

(k) *Hayman v. Moulton*, 5 Esp. 65.

(l) *Ireland v. Thompson*, 4 C. B. 149.

indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting *bonâ fide* according to the best of his judgment, for the benefit of all persons concerned, but the jury found that there was no absolute necessity for the sale; it was held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, that the original owners were entitled to recover its value (*m*). Although the captain of a ship find it impossible to reach his port of destination, he has not any implied authority, as the agent of the shippers, to sell the cargo for their benefit in a foreign port into which he is driven; and if he does so, although it should appear that he acted *bonâ fide* for the interest of all persons concerned in the adventure, yet such sale will be considered as a tortious conversion for which the ship-owner is liable (*n*).

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B., not having been able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (B.) in England. It was held, that A. could not maintain trover against B. for the goods (*o*). Where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he, at the same time, directed the defendants to sell the goods and reimburse themselves the amount of the bill out of the proceeds: it was held, that the defendants having sold the goods, could not be sued for them in trover by the original owner (*p*). It seems, that the original owner might have maintained an action for money had and received for the proceeds, and that the defendants could not have retained the amount of the money advanced to the factor (*q*). Trover will not lie for goods irregularly sold under a distress; the 11 Geo. II. c. 19, s. 19, having declared that the party selling should not be deemed a trespasser *ab initio*, and having given an action on the case to the party grieved by such sale (*r*). But if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer (*s*); for obtaining goods under an abuse of legal process is a conversion (*t*): *secus*, where the goods were obtained under a threat, that if they were not delivered up the expense of a bankruptcy would

(*m*) *Freeman v. The East India Company*, 5 B. & Ald. 617.

(*n*) *Van Omeron v. Dowick*, 2 Campb. 42. As to the master's power to *hypothecate* his cargo, see *ante*, p. 969.

(*o*) *Bromley v. Coxwell*, 2 B. & P. 438.

(*p*) *Stierneland v. Holden*, 4 B. & C. 5. But ordinarily a factor cannot delegate

his authority; *Story on Agency*, s. 13.

(*q*) *Cockran v. Irlam*, 2 M. & S. 302, *acc.* But see *Stephens v. Badcock*, 3 B. & Ad. 354.

(*r*) *Wallace v. King*, 1 H. Bl. 13. See *ante*, p. 611.

(*s*) *Shipwrick v. Blanchard*, 6 T. R. 298.

(*t*) *Grainger v. Hill*, 4 B. N. C. 212.

fall upon him (the holder of the goods), and the commissioner would be very severe with him (*u*). So trover will lie by the assignees of a bankrupt against a sheriff, who sells goods to satisfy an invalid as well as a valid execution against a bankrupt, in order to recover the surplus (*x*).

II. *By whom and against whom Trover may be maintained.*

One joint-tenant, tenant in common, or coparcener, cannot bring trover against his companion for goods remaining in his possession, because the possession of one is the possession of both; if trover be brought, the joint tenancy, &c., is good evidence upon the plea of Not Guilty (*y*). Upon this principle it was held, that A., a member of an amicable society, who had been entrusted with a box, containing the sums of money subscribed, and who was bound by bond to keep it safely, could not maintain trover against B., another member of the same society, and a stranger, in a case where B. had got possession of the box; carried it away; and delivered it to the stranger; *Buller, J.*, observing, that it was admitted, that one of the defendants was a member of the society, and, consequently, had a general property in the box; that a special property could not give a right in this action against a general property. The *custody* only was committed to the plaintiff, the *property* remained in the society (*z*). So if a thing be deposited by one with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the consent of the other, so as to maintain trover upon the bailee's refusal to deliver it (*a*). After an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands: then the solvent partner died, leaving the defendant his executor, and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs; it was held, that they were tenants in common with the solvent partner, and after his decease, with his representative, by relation from the act of bankruptcy; and, consequently, could not maintain trover against the defendant, claiming under such solvent partner (*b*).

If one tenant in common merely takes the thing in common out of the possession of his companion, and carries it away, there no action lies by the other tenant in common; but if he destroy the

(*u*) *Powell v. Hoyland*, 6 Ex. 67.

(*x*) *Stead v. Gascoigne*, 8 Taunt. 527.

(*y*) 2 Leon. 220, case 278. See *post*, p. 1106.

(*z*) *Holliday v. Camsell*, 1 T. R. 658.

(*a*) *May v. Harvey*, 13 East, 197. But if the bailee, under such circumstances,

do deliver it to one of the bailors at his sole request, the two cannot maintain an action against the bailee for the breach of his undertaking; *Brandon v. Scott*, 26 L. J., Q. B. 163.

(*b*) *Smith v. Stokes*, 1 East, 363. See *ante*, p. 1106.

thing in common, the other may bring trespass or trover (*c*). As where it appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into the hands of a third person, who sent it on a foreign voyage, where it was lost, Lord King, C. J., left it to the jury, whether, under the circumstances, the destruction was not by the defendant's (the tenant's in common) means; and, the jury finding in the affirmative, the court, approving of the chief justice's direction, refused to set aside the verdict (*d*). The preceding case proceeded upon the principle, that there was a *destruction* of the subject-matter; and it is now established, that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. Hence, where one of two tenants in common of a whale, cut it up and expressed the oil; it was held, that such alteration in the form of the property did not amount to a tortious conversion, so as to enable the companion to maintain trover; for the act done was an application of the whale to the only purpose which could make it profitable to the owners, and tended to preserve it instead of destroying it; and as the parties were clearly tenants in common of the whale, they became tenants in common of the produce, after it was converted into oil (*e*). *Note.* It was admitted that the taking by the defendant, and the refusal to deliver on demand, was not any misfeasance in a tenant in common, and did not give a right of action. See *Cubitt v. Porter*, 8 B. & C. 257; where it was held, that, where an ancient wall was pulled down by one of two tenants in common with the intention of rebuilding it, and a new wall was built of a greater height than the old one, this was not such a total destruction of the wall as to enable one of the tenants in common to maintain trespass against the other. *Secus* (*semble*), where a chimney is built upon it (*f*).

The rule that one tenant in common cannot bring trover against his companion, holds only in those cases where the law considers the possession of one to be the possession of both. Hence, where A. is tenant in fee of one fourth part of an estate, and B. tenant in common with him, of the other three parts, *for a term of years*,

(*c*) *Brammel v. Jones*, B. R. T. 22 Geo. III., MS.

(*d*) *Barnardiston v. Chapman*, cited 4 East, 121. It seems that the mere sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another, is not equivalent to the destruction of the subject-matter so as to enable his co-tenant to maintain trover against him for it; *Heath v. Hubbard*, 4 East, 110. But if the sale of the subject-matter of a tenancy in common be such

as to alter the property in it, and deprive the co-tenant of his power to enforce his legal rights against the party in possession (*e. g.* if the chattel has been sold in market overt), that would (*semble*) be a conversion; *Mayhew v. Herrick*, 7 C. B. 229.

(*e*) *Fennings v. Lord Grenville*, 1 Taunt. 241.

(*f*) *Stedman v. Smith*, 26 L. J., Q. B. 314.

without impeachment of waste, if A. cut down any trees, and B. take them away, A. may maintain trover; for though B., being dispunishable of waste, might cut down what trees he would, yet trees having an inheritable quality, and B. not having any interest in the inheritance, he cannot take the trees when felled by him who has the inheritance, and, consequently, his possession, being tortious, cannot be said to be the possession of the other (*g*). It is to be observed also, that if one joint-tenant, &c. bring trover without his companion, against a *stranger*, the defendant cannot give the joint-tenancy, &c. in evidence, *on the general issue*, so as to bar the plaintiff of his action, but only to prevent him from recovering any more than his own share in the value of the property in question where such property is divisible (*h*); for it is a general rule, that the defendant can avail himself of an objection of this sort, *viz.*, that all the part owners in a chattel have not joined in an action of trespass or tort, brought in respect of such chattel, *by a plea in abatement only* (*i*); and if one of two part owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, and the part owner recover for his share, the other part owner may afterwards sue alone, and the defendant cannot plead in abatement of such action (*j*).

Trover will lie against a corporation (*k*); who may be guilty of a conversion by the act of their agent, acting under the direction of a committee for managing the affairs of the company (*l*); and though such agent be not appointed under seal, if such act be an ordinary service; such as a distress made under a statute for a debt due to the corporation; and the jury may infer the agency from the subsequent ratification of the act by the corporation, as by receiving the proceeds of the sale (*m*).

III. Pleadings.

Declaration.—This is a transitory action, and the venue may be laid in any county (*n*). The declaration states, that the defendant converted to his own use, or wrongfully deprived the plaintiff of, his goods (*o*), that is to say, iron, hops, household furniture (*according to the fact*). The above form, which is given in Sched. B. to the C. L. P. Act, 1852, will show the manner in which the goods

(*g*) *West v. Pasmore*, Bull. N. P. 35.

(*h*) *Nelthorpe v. Farrington*, 2 Lev. 113; *Barnardiston v. Chapman*, cited 4 East, 121.

(*i*) *Bloxam v. Hubbard*, 5 East, 420.

(*j*) *Sedgworth v. Overend*, 7 T. R. 279.

(*k*) *Yarborough v. The Bank of England*, 16 East, 6.

(*l*) *Duncan v. Surrey Canal Company*, 3 Sta. 50.

(*m*) *Smith v. Birmingham Gas Company*, 1 A. & E. 526. See *Eastern Counties Railway v. Broom*, 6 Ex. 314.

(*n*) *Brown v. Hedges*, Salk. 290.

(*o*) The omission of the words "his goods" would be cured by verdict, *Jones v. Winkworth*, Hardr. 111; but such an omission was held fatal after a judgment by default in *Swallow v. Ayncliff*, B. R., M. 2 Geo. II., MS.

should be described. They should be described with such certainty, that the jury may know what is meant; but the same accuracy is not required as in the action of detinue, which is for the recovery of the things themselves in specie, if to be had. A declaration for twenty ounces of cloves and mace (*p*), ten pair of curtains and valence (*q*); a parcel of diamonds (*r*); the furniture, apparel, &c. belonging to such a ship (*s*); has been held good.

Where the action is brought by an executor, administrator, or the assignees of a bankrupt, the character in which the parties sue must of course appear on the face of the declaration. In trover by husband and wife, the declaration ought not to allege the possession in them both, for the law transfers, in point of ownership, the whole interest to the husband (*t*). If trover be brought *against* husband and wife, and it be alleged in the declaration that *they* converted the goods to their own use, the judgment might formerly have been arrested (*u*), or reversed on writ of error (*v*), but the law is otherwise now (*x*). So in *trespass* against baron and feme for entering a house, and taking goods, the declaration stated, that they converted the goods to their own use; on motion in arrest of judgment, the declaration was held good; for the conversion in this case is not the gist of the action; and the action being maintainable for entering the house and taking the goods, the court will intend that the damages were given for those trespasses only (*y*).

Pleas. Not Guilty.—The general issue in this action is Not Guilty. By 20 Pl. R., H. T. 1853—In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting, the goods mentioned, but not of the plaintiff's property therein (*z*).

Evidence of lien is not admissible under the general issue (*a*); for that plea, by the above rule, denies the conversion only, and admits the title of the plaintiff, which consists of the right of property *and* right of possession, at the time of conversion; whereas a lien is inconsistent with and negatives the plaintiff's right of possession. So under the plea of not guilty, the defendant cannot set up an absolute property in himself in the chattel by sale from the plaintiff, although the only evidence of conversion is a demand and refusal (*b*); he must plead "not possessed" (*c*). But although, from the above instances, it will be seen that the defendant who

(*p*) *Hartford v. Jones*, Salk. 654.

(*q*) *Taylor v. Wells*, 2 Wms. Saund. 74.

(*r*) *White v. Graham*, 2 Str. 827.

(*s*) *Nightingale v. Bridges*, Carth. 131.

(*t*) *Per Yelverton, J.*, Yelv. 165. But see *Ayling v. Whicher*, 6 A. & E. 259.

(*u*) *Rhemes v. Humphrys*, Cro. Car. 254.

(*v*) *Berry v. Nevys*, Cro. Jac. 661.

(*x*) *Keyworth v. Hill*, 3 B. & Ald. 685.

(*y*) *Smalley v. Kerfoot*, Str. 1094; *Pullen v. Palmer*, Bull. N. P. 46.

(*z*) This is substantially the same as the Pleading Rule of H. T., 4 Will. IV. 4, 1.

(*a*) *White v. Teal*, 12 A. & E. 106; *Dorrington v. Carter*, 1 Ex. 566.

(*b*) *Barton v. Brown*, 5 M. & W. 298.

(*c*) *Ringham v. Clements*, 12 Q. B. 260.

pleads not guilty alone in an action of trover, admits thereby that the plaintiff has some property in the goods, in respect of which he would be entitled to recover against the defendant; such admission does not preclude the defendant from showing under the general issue, that he is tenant in common, or joint tenant, of the chattel, with the plaintiff (*d*); for the term "conversion" in the above rules, means a *wrongful* conversion, and not the *fact* of conversion merely (*e*). Any facts, therefore, which deny the wrongful character of the act, would, it seems, be admissible under the general issue, *e. g.*, leave and license from the plaintiff, a justifiable taking of goods as a distress, for rent, or for damage feasant, or toll due; or by a sheriff under a *fi. fa.*; or by an execution creditor setting such sheriff in motion (*f*). "Not guilty and not possessed together, make up the old not guilty, and whatever might be given in evidence under not guilty before the new rules" (of Hil. T. 1832), "may be proved under one or the other of them." *Per Alderson*, B. (*g*):

Not Possessed.—The defendant may deny the plaintiff's title to the goods by pleading that the goods were not the goods of the plaintiff as alleged. This is called the plea of "not possessed."

Where the plaintiff in trover claims under a sale, the defendant, under a plea that the goods are not the plaintiff's, may show the sale to have been fraudulent (*h*) (see *ante*, p. 1279). A party who negligently or culpably stands by and allows another to contract (*e. g.*, to buy goods), on the faith and understanding of a fact which he can contradict (*e. g.*, that he is the real owner of the goods), cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving (*e. g.*, the purchaser of the goods); and this defence is admissible on the plea of not possessed (*i*). The plea of no property in the plaintiff, means no property as against the defendant, and puts in issue the right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion (*j*); therefore, in an action of trover against the assignees of a bankrupt, this plea lets in evidence that the goods were, at the time of the bankruptcy, within the order and disposition of the bankrupt as reputed owner, and that the defendants as assignees sold the goods (*k*). So a lien may be given in evidence under the plea that the plaintiff was not lawfully possessed (*l*). In actions by assignees of bankrupts against the sheriff,

(*d*) *Higgins v. Thomas*, 8 Q. B. 908.

(*e*) *Young v. Cooper*, 6 Ex. 259. The contrary was held in *Stanchiffe v. Hardwick*, 2 C. M. & R. 1; but this case has been overruled. See *Mayhew v. Herrick*, 7 C. B. 250.

(*f*) *Young v. Cooper*, 6 Ex. 259.

(*g*) *Whitmore v. Green*, 13 M. & W. 107.

(*h*) *Ashby v. Minnitt*, 8 A. & E. 121; *Howarth v. Tollemache*, 4 M. & G. 427.

(*i*) *Gregg v. Wells*, 10 A. & E. 90. See *Vernon v. Shipton*, 2 M. & W. 13.

(*j*) *Nicolls v. Bastard*, 2 C. M. & R. 659.

(*k*) *Isaac v. Belcher*, 5 M. & W. 139.

(*l*) *Owen v. Knight*, 4 B. N. C. 54; *Brandao v. Barnett*, 1 M. & G. 908.

a *fi. fa. bonâ fide* executed and levied by seizure and sale before fiat (in accordance with the 133rd section of the 12 & 13 Vict. c. 106) without notice of a prior act of bankruptcy, is admissible either under the plea of not possessed, or not guilty (*m*); *semble* under the former (*n*). But in trover against the sheriff, and the execution creditor, for taking goods under an execution, it is not, it seems, open to the sheriff under such plea, to give evidence of facts justifying the seizure, distinguishing his case from that of the other defendant (*o*). Where the defendant pleaded, that the goods for which the action was brought were the goods of one J. H., and were not the goods of the plaintiff, it was held, that the issue raised was, whether the goods were the plaintiff's *solely*; and that, upon evidence that the goods belonged to J. H. and the plaintiff jointly, the plaintiff was entitled to the verdict (*p*).

A., in 1837, bought goods of B., and allowed B. to remain in possession of them up to 1839, when B. became bankrupt. B.'s assignees made no claim, and B. retained possession of the goods till 1841, when the sheriff, under a *fi. fa.* against B., seized and sold the goods. After the sale, B.'s assignees gave notice of their claim to the sheriff, who, upon receiving an indemnity, handed over the proceeds to them. A. brought trover against the sheriff. Held, that, under the plea of not possessed, the sheriff might set up the title of the assignees (*q*). It will be observed, that in this case the plaintiff had not, and the defendant had, *actual possession*, of the goods. Where this is reversed, and the plaintiff, under similar circumstances is, and the defendant is not, in actual possession, such a defence is inadmissible, for possession is sufficient against a wrong-doer (*r*). Where a person, after the death of an intestate, wrongfully takes possession of the intestate's goods, he cannot, in an action against him by the rightful administrator, set up the bankruptcy of the intestate, and the consequent vesting of his property in the assignees, the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them (*s*). So where the bankrupt transferred goods by an instrument which the jury found to be a fraudulent preference, and the transferee, after the bankruptcy and appointment of assignees, brought an action for an illegal distress upon the goods which were the subject of the conveyance; and the assignees had no further elected to assert their right to the goods than by *commencing* an action of trover for them; it was held, that the distrainor could not set up the assignees' title under

(*m*) *Per Parke, B., Unwin v. St. Quintin*, 11 M. & W. 286.

(*n*) *S. C.* And see *Pearson v. Graham*, 6 A. & E. 898.

(*o*) *Samuel v. Duke*, 3 M. & W. 622.

(*p*) *Farrar v. Beswick*, 1 M. & W. 682.

(*q*) *Leake v. Loveday*, 4 M. & G. 972. See *Cheesman v. Exall*, 6 Ex. 341.

(*r*) *Jeffries v. Great Western Railway*, 5 E. & B. 802.

(*s*) *Fyson v. Chambers*, 9 M. & W. 460.

"not possessed," for the transfer was good against all the world but the assignees, and the mere commencement of an action of trover by the assignees, which might be abandoned at any time, could not, without more, be taken to be an election on their part to avoid the transfer (*t*).

Of Liens.—The plea of not possessed, denies both the plaintiff's right of property *and* right of possession (*ante*, p. 1310); a lien, therefore, which is inconsistent with the latter proposition, may be given in evidence under this plea. There are two species of liens known to the law, namely, *particular* liens and *general* liens. *Particular* liens are, where persons claim a right to retain goods, in respect of labour or money expended on such goods, and these liens are favoured in law. *General* liens are claimed in respect of a general balance of account; and these are founded on express agreement, or are raised by implication of law, from the usage of trade, or from the course of dealing between the parties, whence it may be inferred, that the contract in question was made with reference to their usual course of dealing; and these are to be taken strictly, not being favoured by the law (*u*). Where a man has a lien upon goods, he may deal with them in a reasonable manner, so as to maintain his lien (*v*). By the common law, where a party is obliged to receive goods, he is also entitled to retain them for his indemnity (*x*). Upon this principle, it has been held, that common carriers (*y*) and innkeepers (*z*) have a particular lien on the goods intrusted to their care (*a*). As instances of particular liens, millers have a lien on the produce of corn, which they have ground, for the price of grinding (*b*). So a shipwright has a lien upon a ship for repairs (*c*). So a dyer for the price of dyeing goods (*d*). So the town agent of a country attorney, upon the papers in the particular cause (*e*). But an artificer, *e. g.*, a shipwright, who, in the exercise of his right of lien, detains a chattel, *e. g.*, a ship, upon which he has expended his labour and materials, has no lien upon the chattel for taking care of it while so detained, although he give the owner notice that he shall demand a certain

(*t*) *Newnham v. Stevenson*, 10 C. B. 713.

(*u*) *Per Heath, J.*, 3 B. & P. 494; *per Lord Mansfield, C. J.*, 4 Burr. 2221.

(*v*) *Edwards v. Southgate*, 12 W. R. 568.

(*x*) *Per Lord Kenyon, C. J.*, 1 Esp. 109. It was said by *Ryder, C. J.*, delivering the opinion of the court in *Brenan v. Currin*, T. 28 & 29 Geo. II., B. R., MS., that he had not found it laid down as a general rule, that the remedy by retainer was co-extensive with the obligation to receive goods. But see *Yorke v. Grenough*, Lord Raym. 867.

(*y*) *Skinner v. Upshaw, Ld. Raym.* 752; although the goods be delivered to

them by a person who had no right to them; case of the *Exeter carrier*, cited in *Yorke v. Grenough*. Ld. Raym. 752. See *ante*, p. 358.

(*z*) As to what is an inn, see *Thompson v. Lacy*, 3 B. & Ald. 283, and *Johnson v. Hill*, 3 Stark. 172, *post*, p. 1326.

(*a*) But an innkeeper cannot detain the person of his guest, or take off his clothes to secure payment of his bill. *Sunbolv v. Alford*, 3 M. & W. 248.

(*b*) *Exp. Ockenden*, 1 Atk. 235.

(*c*) *Franklin v. Hosier*, 4 B. & Ald. 341.

(*d*) *Green v. Farmer*, 1 W. Bl. 651.

(*e*) *Dicas v. Stockley*, 7 C. & P. 587. See *post*, p. 1314.

sum for the use of his dock during the detention (*f*). So a coach-maker cannot claim a right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time and after notice has been given him to remove it (*g*). A person, who by his own labour preserves goods, which the owner, or those intrusted with the care of them, have either abandoned in distress *at sea*, or are unable to protect and secure, is entitled by the common law of England to retain the possession of the goods saved, until a proper compensation is made to him for his trouble (*h*). The reason of this rule is obvious; goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents, (far beyond the reach of human foresight to prevent,) are hourly creating, and against which it too often happens, that the greatest diligence, and the most strenuous exertions of the mariner, cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service (*i*). But where work has not been done *upon* the goods, there is no lien. Thus, where a mortgage deed was delivered to an appraiser to obtain the money from the mortgagor, which after several applications he failed in doing; it was held, that he could not retain the deed as a lien for his trouble, there being no work done *on* the subject-matter in dispute (*j*). It makes no difference that the chattel is delivered to the workman, &c., in different parcels, if the work is done under one entire agreement; and the lien for the whole amount due attaches to each parcel (*k*). Thus, a printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of the numbers for which he was employed (*l*).

There cannot be any lien, unless there is possession. The defendant was the owner of a ship, B. was the charterer, and for one sum of 2100*l.*, to be paid at different periods, was to have the whole use of the ship for the voyage out to the Cape of Good Hope and home to London. A quantity of goods belonging to B. formed part of the homeward cargo. B. having become a bankrupt shortly before the vessel left the Cape on her homeward voyage, the defendant, on her arrival at the port of London, seized B.'s goods,

(*f*) *The British Empire Shipping Company v. Somes*, 27 L. J., Q. B. 397.

(*g*) *Hartley v. Hitchcock*, 1 Sta. 408.

(*h*) *Per Holt*, C. J., in *Hartfort v. Jones*, Ld. Raym. 393; Abbott, 494, (6th edit.). See 17 & 18 Vict. c. 104,

s. 458, *et seq.* as to salvage.

(*i*) *Nicholson v. Chapman*, 2 H. Bl. 254, *per Eyre*, C. J.

(*j*) *Sanderson v. Bell*, 2 Cr. & M. 304.

(*k*) *Chase v. Westmore*, 5 M. & S. 180.

(*l*) *Blake v. Nicholson*, 3 M. & S. 167

claiming a lien on them. But the court were of opinion, that the defendant was not entitled to any lien; for B., the bankrupt, was the owner of the ship for the voyage, and until that was terminated, the possession of the ship did not revert to the defendant (*m*). "The question in all these cases generally has been a question of construction, whether there has been an entire letting or parting with the possession of the ship for given purposes, so that during that time the owner has no efficient control, but the charterer has the full disposition of the ship, or in other words, to use the language of *Gibbs, C. J.*, in *Tate v. Meek* (8 Taunt. 280), whether the delivery of the cargo and the payment of the freight are to be considered as concomitant acts. When the facts are ascertained, the legal result is clear" (*n*). So if the possession be parted with, the lien is gone. Thus, if a party having a lien on goods causes them to be taken in execution at his own suit, and purchases them, he thereby loses his lien, although the goods are never removed off the premises, for, in order to sell, the sheriff must have had possession (*o*). So if a person having a lien, abuses it, as by pledging or selling (*p*) the goods, the owner's right to the possession revives, and he may maintain trover (*q*). But a master of a vessel being turned out of possession, upon the vessel's being captured, is not deprived of his lien for the freight, in case of her recapture (*r*).

As to general liens (which extend only to attornies, bankers and factors (*s*), and of which the court will take judicial notice (*t*)), it has been determined, that the attornies and solicitors of the different courts have a lien on all papers remaining in their hands, and judgments recovered, for their costs (*u*). An attorney has a lien for his general balance on papers of his clients, which come to his hands *in the course of his professional employment*; therefore, where C. gave his attorney a specific sum for the purpose of satisfying a debt for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt; it was held, that the attorney had a

(*m*) *Hutton v. Bragg*, 7 Taunt. 14.

(*n*) *Per Parke, B., Christie v. Lewis*, 2 B. & B. 410. *Belcher v. Capper*, 4 M. & G. 502, *acc.*

(*o*) *Jacobs v. Latour*, 5 Bingh. 130.

(*p*) *Clark v. Gilbert*, 2 B. N. C. 356.

(*q*) *Scott v. Newington*, 1 M. & Rob. 252. See cases quoted *ante*, p. 1291; and *Wilmhurst v. Bowker*, *ante*, p. 1290.

(*r*) *Exp. Cheesman, re Welfitt*, 2 Eden, C. T. N. 181.

(*s*) *Per Parke, B., Turner v. Deane*, *infra*.

(*t*) *Brandao v. Barnett*, 6 M. & G. 665.

(*u*) *Mitchell v. Oldfield*, 4 T. R. 123, *per Lord Kenyon, C. J.* In one case, where A. purchased a lease for years, and the writings were left in the hands of B., an attorney, to draw up the assignment, B. drew it, and it was sealed, but B. refused to deliver it, until A. paid for the drawing, &c.; upon which A. brought trover against B. for the deed: *Holt, C. J.*, held, that the action would lie; because B. might have an action for what he deserved, but that he could not detain for it. *Anon.*, at Nisi Prius, 1 Ld. Raym. 738. *Sed quære*.

lien on it for his general balance due from C. ; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came into his hands ; some of those acceptances, when the lease did come to his hands, having been dishonoured, and one of them taken up by the attorney (*v*). The lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him has therein (*x*). Every one, whether attorney or not, has, by the common law, a lien on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor (*y*). A town clerk has no general lien on the papers of the corporation, which he holds *quod* town clerk only (*z*). An attorney has no lien on his client's money beyond the amount which the latter is indebted to him (*a*). Nor can an attorney detain the private deed of one partner in respect of business done for the firm (*b*).

Where a banker has advanced money to a customer, he has a lien upon all the securities which come into his hands, *as a banker*, belonging to that person, for the amount of his general balance : unless there be evidence to show that he received any particular security, under special circumstances, which would take it out of the general rule (*c*). Thus, where A. bought for B., and with B.'s money, certain exchequer bills, which A. deposited in a box that he kept at his bankers, himself retaining the key ; and, from time to time, when it became necessary to receive the interest and exchange the exchequer bills for new ones, took them out of the box and handed them to the bankers *for that purpose only*, the exchequer bills never being entered to A.'s account ; and on the last occasion that A. did so, the new bills were not replaced in the box, owing to A. being ill, but remained in the bankers' possession at the time of A.'s failure ; it was held, that the bankers had no lien upon the exchequer bills for the general balance due from A., they having been delivered to the bankers for a special purpose inconsistent with the existence of such lien (*d*). But a banker has no lien on muniments casually left in his shop after he has refused to advance money on them as a security (*e*).

"A factor has not only a right to keep goods, till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general ac-

(*v*) *Stevenson v. Blakelock*, 1 M. & S. 535.

(*x*) *Acc. Wakefield v. Newbon*, 6 Q. B. 276.

(*y*) *Hollis v. Claridge*, 4 Taunt. 807.

(*z*) *R. v. Sankey*, 5 A. & E. 423.

(*a*) *Miller v. Attree*, 3 Ex. 799.

(*b*) *Turner v. Deane*, 3 Ex. 837.

(*c*) *Davis v. Bowsher*, 5 T. R. 488.

(*d*) *Brandao v. Barnett*, 3 C. B. 519. The action was by B., but it was held that that made no difference, as the exchequer bills were negotiable, and the property in them passed by delivery.

(*e*) *Lucas v. Dorrien*, 7 Taunt. 278.

count" (f). But where the defendants, as brokers, contracted for a quantity of staves to remain on the premises of the vendor, rent-free, for one month, and after that, at a certain rent to be paid by their principal, who subsequently gave orders for a removal of part, and directed that the residue should not be removed until further orders from him; it was held, that never having, in fact, been in the possession or control of the brokers, they had not a lien on the goods for their general balance (g). Policy brokers have a lien for their general balance (h), even as against agents who do not disclose their principals (i); but not where they have notice, that the person who employs them acts merely as an agent (k); and it has been held, that where an English subject, in time of war, informed the broker, that the property insured was neutral, that was a sufficient indication to the broker, that the party acted as agent (l). If the broker has lost by his own act the right to retain as a lien, upon which he relies in his plea under a particular custom of the City of London, he will not be allowed to desert his plea of lien and rest his defence upon another and totally distinct ground (e. g., a right to retain the property for a balance due to him on mutual credit), without specially pleading it (m). If a broker having a lien on a policy part with it, his lien revives on repossession (n). See further as to the lien of factors, *ante*, p. 740.

In addition to the above three instances of general liens, which prevail over the whole country, a lien for a general balance may be established, by express agreement, between particular persons, or at a particular place. As where an agreement was entered into by a number of dyers, dressers, bleachers, &c., of Manchester and the neighbourhood, at a public meeting, that they would not receive any more goods to be dyed, &c., but on condition that they should have a lien respectively on those goods for their general balance, the defendant, who had entered into the agreement, was held entitled to retain for his general balance against the plaintiff, who had received notice of the meeting and agreement by public advertisement (o). So a general lien may be established by the custom of trade, as in the case of dyers (p); who have no general lien independent of such usage (q); not at Halifax, for instance (r); wharfingers (s), calico printers (t). But cloth fullers have not (u),

(f) *Per Buller, J.*, in *Lickbarrow v. Mason*, 6 East, 22, n.; *per Cur.*, *Godin v. London Assurance Company*, 1 Burr. 494, *acc.*

(g) *Taylor v. Robinson*, 2 Moore, 730.

(h) *Whitehead v. Vaughan*, B. R., T. 25 Geo. III., Co. B. L. 547 (7th edit.).

(i) *Mann v. Forrester*, 4 Campb. 60; *Westwood v. Bell*, *ibid.* 349.

(k) *Snook v. Davidson*, 2 Campb. 218; *Lanyon v. Blanchard*, *ibid.* 597; *Cahill v. Dawson*, 3 C. B., N. S. 106, *acc.*

(l) *Maanss v. Henderson*, 1 East, 335.

(m) *Hewison v. Guthrie*, 2 B. N. C. 760.

(n) *Levy v. Barnard*, 8 Taunt. 149; but see *Jacobs v. Latour*, 5 Bing. 130, *ante*, p. 1314.

(o) *Kirkman v. Shawcross*, 6 T. R. 14.

(p) *Savill v. Barchard*, 4 Esp. 53.

(q) *Bennett v. Johnson*, 3 Dougl. 387.

(r) *Close v. Waterhouse*, 6 East, 523, n.

(s) *Naylor v. Mangles*, 1 Esp. 109. As to warehousemen, *quære*. See *R. v. Humphery*, M'Clel. & Y. 173.

(t) *Weldon v. Gould*, 3 Esp. 268; *Exp. Andrews*, *per Lord Northington*, Ch., Co. B. L. 429 (5th edit.).

(u) *Rose v. Hart*, 8 Taunt. 499.

nor stereotype printers (*x*). A custom for public warehousemen, in London, to retain for their general balance goods deposited with them by merchants, *for or in the name* of the merchants or other persons by whom such warehousemen are employed is bad, as extending to the property of third parties (*y*). Such usage must be clearly proved (*z*). Where, therefore, in the case of common carriers, a usage to retain for their general balance was proved to have been frequently exercised by the defendant and other common carriers throughout the North for ten or twelve years before, and in one instance for thirty years, and the jury, though no opposing evidence was given, negatived the usage, the court refused to grant a new trial (*a*). So where in a case stated for the opinion of the court, (which was to have the same power of drawing inferences as a jury), it was found, that a claim among wharfingers at Hull to retain generally for warehouse rent, and their labour in landing, weighing, and delivering goods, had been admitted in a large majority of instances, though disputed in others, it was held that the claim could not be supported (*b*).

The master of a vessel has a lien on the luggage of a person whom he has conveyed in his vessel, until a reasonable sum has been tendered for the passage (*c*). *Note.* It did not appear in this case what were the terms of the contract: but it was proved, that the defendant had brought the plaintiff, and his trunk containing his wearing-apparel, home in his vessel from the Brazils to London: 15*l.* had been paid by the plaintiff, but the defendant claimed 15*l.* more, and insisted on detaining the trunk until the rest was paid. It was proved that 30*l.* was a reasonable sum for the conveyance of the plaintiff. But the master of a ship has not a lien on the ship, for money expended or debts incurred by him for repairs done to it on the voyage (*d*). Nor has he a lien on the freight for his wages, or for his disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo (*e*). A. commissioned B. to sell a ship, and having deposited her register with him for that purpose, became bankrupt: it was held, that the Register Acts did not prevent B. having a lien on the register deposited with him (*f*). So where the certificate of registry had been deposited as a security for advances made for the use of the ship (*g*).

A right of detaining a thing, until the money due for the work done upon it be paid, may be waived by a special agreement, as to

(*x*) *Bleaden v. Hancock*, 1 M. & M. 465; *i. e.*, for the expenses of printing, on plates not manufactured by themselves, but put into their hands to print from.

(*y*) *Leuckhart v. Cooper*, 3 B. N. C. 99.

(*z*) *Bleaden v. Hancock*, 4 C. & P. 152.

(*a*) *Rushforth v. Hadfield*, 7 East, 224.

(*b*) *Holderness v. Collinson*, 7 B. & C. 212.

(*c*) *Wolf v. Summers*, 2 Campb. 631.

(*d*) *Hussey v. Christie*, 9 East, 426.

(*e*) *Smith v. Plummer*, 1 B. & Ald. 575.

(*f*) *Mestaer v. Atkins*, 5 Taunt. 381.

(*g*) *Bowen v. Fox*, 10 B. & C. 41.

the time or mode of payment; but not merely by an agreement for the payment of a fixed sum (*h*). The principle appears to be this—that a special agreement does not of itself destroy the right to detain; but if it contain some term inconsistent with that right, it will (*i*). Thus a set-off cannot be considered as destroying a lien, unless it be so agreed upon between the parties (*k*). But if a security be taken for the debt, for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone (*l*). A quantity of iron was imported by A., and landed on the 14th of October at defendant's wharf. On the 15th of October, the plaintiffs purchased the iron of A., paid for it, and obtained an order for the delivery, under which, part was delivered at different times, until the March following, when A., the importer, becoming bankrupt, the remainder of the iron was detained by the defendants claiming a lien on it in respect of their charges for wharfage. The course of dealing proved was, that these charges were usually paid by the merchant importer; at the Christmas following the importation, whether the iron had, in the mean time, been removed or not. *Abbott*, C. J., was of opinion, that the defendants were not entitled to a lien; for, at the time the iron was purchased by the plaintiffs, the defendants had not any lien upon it for their charges; and in this opinion the court afterwards concurred (*m*); *Holroyd*, J., observing, that the wharfage was not payable till Christmas, and by the sale the plaintiff had a right to an immediate delivery; and the subsequent default of the importers to pay the debt due from them would not alter the case. But, if the securities be dishonoured, while the goods remain in the possession of the creditor, the lien revives (*n*).

On somewhat analogous principles it is held, that if a person having a lien upon goods, *e. g.*, for warehouse rent, when they are demanded of him, claims to retain them *upon a different ground*, *viz.* that the goods are his own property, and does not make any mention of the lien, trover may be maintained against him, without evidence of a tender having been made to him in respect of his lien (*o*). So where a picture was placed by A. in the hands of B. for sale, and B. deposited it with C., and C., on A.'s demanding his picture, claimed 5s. for warehouse-room; but on a second demand being made by A., and his offering to pay whatever C. claimed for warehouse-room, C. refused to deliver it without being paid 8*l.* which was due to him from B.; it was held, that a tender of the 5s. for warehouse-room was dispensed with. The vendor

(*h*) *Chase v. Westmore*, 5 M. & S. 180; per *Gibbs*, C. J., in *Hutton v. Bragg*, 7 Taunt. 25.

(*i*) Per *Parke*, B., *Scarfe v. Morgan*, 4 M. & W. 283.

(*k*) *Pinnock v. Harrison*, 3 M. & W. 532.

(*l*) Per *Tindal*, C. J., in *Hewison v.*

Guthrie, 2 B. N. C. 759.

(*m*) *Crawshay v. Homfray*, 4 B. & Ald. 50.

(*n*) *Stevenson v. Blakelock*, 1 M. & S. 534; per *Bayley*, J., in *Miles v. Gorton*, 2 C. & M. 510.

(*o*) *Boardman v. Sill*, 1 Campb. 410, n.

of a quantity of tin, shipped the same on board a ship to Leghorn, by the orders of the vendee; and the captain, by his bill of lading, undertook to deliver the tin to an individual at Leghorn; the tin, being heavy, was placed at the bottom of the hold, with other goods over it; the vendee having become bankrupt, the vendor required the captain to deliver the tin, but did not tender the freight, or offer to make any compensation to him for the trouble of unloading the vessel. The captain refused, alleging that he had signed a bill of lading to deliver the tin to another person: and that he would not deliver it to the plaintiff; it was held, that this was presumptive evidence of a conversion; for the captain had dispensed with the tender (*p*). But a claim to hold goods for a general balance, which includes the particular lien, is no dispensation of a tender of the specific sum due for work done upon those goods (*q*). However, in trover against a carrier (*r*), who had detained goods under a claim of lien, it was held not necessary for the plaintiff to prove an actual tender of the carriage money, it appearing that he was ready to pay it, but that the defendant refused to deliver the goods, except upon payment of an alleged old balance, which the jury found was not really due. See further as to tender, *ante*, p. 186.

A trainer has a lien on a race-horse for the expenses and skill bestowed in the keeping *and* training him; on the principle, that, where a bailee bestows labour and skill in the improvement of the subject delivered to him, he has a lien for the charge (*s*). So where S. sent a mare to M., to be covered by a stallion belonging to him, which was done accordingly; it was held, that M. was entitled to a specific lien on the mare for the charge of covering her (*t*). But the case of agistment does not fall within this principle, as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, but simply takes in an animal to feed it. Hence an agister of milch cows has no lien (*u*); and a person to whom a horse is delivered to be stabled, taken care of, fed and kept, has not any lien for the charge (*x*). These two cases rest also on the ground mentioned *ante*, p. 1318, that the implied agreement in such cases is inconsistent with the existence of a lien, for the owner of the milch cows has a right to the possession of

(*p*) *Thompson v. Trail*, 6 B. & C. 36. The captain may, in such a case, retain for his freight, and also insist upon the delivery up of the bills of lading, or an indemnity against them; *Tindall v. Taylor*, 4 E. & B. 219. So if he had assigned this as a reason, his refusal would not have been a conversion.

(*q*) *Scarfe v. Morgan*, 4 M. & W. 270. But see *Ayling v. Williams*, 5 C. & P.

399; *Poiglass v. Oliver*, 2 C. & J. 17, *per Bayley, J.*

(*r*) *Jones v. Tarleton*, 9 M. & W. 675.

(*s*) *Bevan v. Waters*, 1 M. & M. 236. See *Sanderson v. Bell*, 2 C. & M. 312.

(*t*) *Scarfe v. Morgan*, 4 M. & W. 270.

(*u*) *Jackson v. Cummins*, 5 M. & W. 342.

(*x*) *Judson v. Etheridge*, 1 Cr. & M. 743.

the cows, when he pleases, for the purpose of milking them (*y*), and the owner of the horse at a livery stable keeper's has a right to the possession of the horse for the purpose of riding or driving him (*z*). So in the case of training race-horses, although the labour and skill employed by the trainer in the improvement of the animal are a good foundation for a lien, yet, if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the lien does not exist, such usage or contract being inconsistent therewith (*a*).

A lord of a manor seized a beast as an estray, and kept it for some time, after having proclaimed it; the owner afterwards, and within the year, claimed it, and brought trover, without having first tendered a satisfaction for the keeping of it; and for the want of this it was held, that the action would not lie (*b*). The distrainer of goods, which have been replevied, cannot claim any lien upon them (*c*). So if a horse be distrained in order to compel an appearance in a hundred court, after appearance, the plaintiff cannot justify detaining the horse, until his keep is paid for (*d*). Where a person has a simple lien on goods, he cannot sell and dispose of them; but if he has a special property in those goods in trust for another, subject to a claim of his own, in such case the party may sell in order to repay himself (*e*). A party cannot acquire a lien by his wrongful act (*f*). If the defendant is to be considered as a mere wrong-doer, it is not necessary for the plaintiff to tender him an indemnification for expenses, which have been incurred by him in order to obtain a wrongful possession (*g*). So no formal tender is necessary, where the defendant is not in a situation to deliver up the goods (*h*). It seems that the same rule holds where the defendant has incurred an expense in respect of the plaintiff's goods, without an authority from the plaintiff (*i*). This case, however, was denied to be law by Lord *Mansfield*, C. J. (*k*). Where possession has been obtained by a misrepresentation on the part of the defendant, he cannot set up a lien, to which he might otherwise have been entitled (*l*).

Property held by a party in right of a lien cannot be taken in execution; for a lien is a personal right, and continues only so long as the possessor holds the goods; and the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods (*m*).

(*y*) *Jackson v. Cummins*, 5 M. & W. 342.

(*z*) *Per Parke*, in *Scarfe v. Morgan*, 4 M. & W. 270.

(*a*) *Forth v. Simpson*, 13 Q. B. 680.

(*b*) 2 Roll. Abr. 92, (M.) pl. 3.

(*c*) *Bradyll v. Ball*, 1 Bro. C. C. 427.

(*d*) *Lenton v. Cook*, Bull. N. P. 45.

(*e*) *Per Holroyd, J.*, *Cazenove v. Prevost*, 5 B. & Ald. 78.

(*f*) *Griffiths v. Hyde*, Dorset Sum. Ass. 1809, *Lawrence, J.*

(*g*) *Lempriere v. Pasley*, 2 T. R. 485.

(*h*) *Jones v. Cliff*, 1 Cr. & M. 540.

(*i*) *Stone v. Lingwood*, 1 Str. 651.

(*k*) 4 Burr. 2218.

(*l*) *Madden v. Kempster*, 1 Campb. 12.

(*m*) *Legg v. Evans*, 6 M. & W. 36.

Statute of Limitations.—The defendant may plead the Statute of Limitations (21 Jac. I. c. 16), *viz.* that the alleged cause of action did not accrue within six years before suit. The statute is a bar to an action commenced more than six years after the conversion, although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud to prevent the plaintiff from obtaining that knowledge at an earlier period (*n*). Where an executor, several years before, had left some goods in the house, by the consent of the heir, who used them afterwards, and, within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them, whereupon trover was brought and the Statute of Limitations pleaded; it was held, that the user *before* the demand was neither a conversion, nor any evidence of it: for it was with the consent of the executor until that time: and the demand being within six years, the refusal, which ensued it, and which was the only evidence of a conversion in the case, was within the six years; and if a trover be before the six years, and a conversion after, the statute cannot be pleaded (*o*). In 1825, wine was deposited by an agent of the plaintiff, in the defendant's cellar, by her leave. At or about the end of the year 1826, the wine becoming injured by remaining in the wood, the defendant bottled part of it. Afterwards, but when it did not appear, she consumed part of it. In November 1827, the plaintiff demanded it, referring in his letter to a previous demand of the wine made in the preceding March, and offering to indemnify the defendant against the claim of any other person. The application was not noticed. A subsequent demand and refusal were proved. The action was commenced in October, 1833. It was held, that on this evidence the jury were not bound to infer a demand and refusal more than six years before action, or that the bottling the wine was a conversion; and *semble*, that if a bailee of wine converts part of it without the owner's knowledge, he cannot set up the conversion of part as a conversion of the whole to support a plea of the Statute of Limitations (*p*).

Bankruptcy.—The bankruptcy of the defendant, after the cause of action accrued, cannot be pleaded, because the damages in trover are uncertain (*q*).

New Assignment.—In trover for 400 bales and 400 bags of cotton, the defendant pleaded, as to 304 bales, parcel, &c., a right of stoppage *in transitu*. The plaintiffs newly assigned, that they sued for the conversion of bales of cotton, "different to and other than the bales in the plea mentioned," *and also* for the conversion

(*n*) *Granger v. George*, 5 B. & C. 149.

(*o*) *Wortley Montague v. Lord Sandwich*, 7 Mod. 99. See *Topham v. Brad-*

dick, 1 Taunt. 577.

(*p*) *Philpott v. Kelley*, 3 A. & E. 106.

(*q*) *Parker v. Norton*, 6 T. R. 695.

of the *last-mentioned* bales of cotton "on other and different occasions and times, and for other and different purposes, than in the plea mentioned." It was contended at the trial, that the plaintiff was bound, under the new assignment, to prove a conversion of cotton other than that mentioned in the plea; but it was held, that the new assignment might be considered as alleging a different conversion of the same cotton bales, as well as a conversion of cotton altogether different (*r*).

IV. Evidence.

In order to maintain this action, the plaintiff must prove:—
1. Property and right of possession in himself in the goods in question. 2. The nature and value of the goods. 3. A conversion. In general this is the only proof requisite; for it is not necessary to prove the manner in which the goods came to the hands of the defendant (*s*).

In trover for a debenture, the plaintiff must formerly have proved the number of the debenture as laid in the declaration, and the exact sum to a farthing, or he would have been nonsuited (*t*); but he need not have set out the number (any more than the date of a bond, for which trover is brought); for the plaintiff, not being possessed of the debenture, might not have known the number, and if he should have made a mistake in setting out the number, he would have failed in the action (*u*); but such a mistake would now be amendable. In trover for a bond, the plaintiff will be permitted to give parol evidence of the contents, although he has not given the defendant notice to produce the instrument itself (*x*); and although the defendant offers to produce the instrument, the plaintiff is not bound to put it in (*y*). So in trover for the certificate of a ship's registry, the certificate may be proved to have been granted to the plaintiff by the production of the registry, from which it was copied, though notice has not been given to the defendant to produce the certificate itself (*z*). "Where a written instrument is to be used as a medium of proof, by which a claim to a demand *arising out of the instrument* is to be supported, there I admit the instrument itself must be produced, or notice to produce it must have been given to the defendant, before any evidence of its contents can be received; but this being an action of trover *for the certificate of registry itself*, I can see no sound reason why evidence should not be admitted of the existence of the certificate, in the same manner as evidence of a picture, or other specific thing, is constantly admitted, where it is sought to be

(*r*) *Brancker v. Molyneux*, 1 M. & G. 710.

(*s*) Bull. N. P. 33.

(*t*) *Per Holt*, C. J., Bull. N. P. 37.

(*u*) *Wilson v. Chambers*, Cro. Car. 262.

(*x*) *How v. Hall*, 14 East, 274; *Jolley v. Taylor*, 1 Campb. 144, acc.

(*y*) *Whitehead v. Scott*, 1 M. & Rob. 2.

(*z*) *Bucher v. Jarratt*, 3 B. & P. 143.

recovered in the same form of action." *Per Rooke, J., S. C.* In these cases the nature of the action is sufficient notice to the defendant of the subject of inquiry.

In trover for a ship, the mere fact of possession as owner is sufficient *prima facie* evidence of ownership, without the aid of any documentary proof of title, as the bill of sale or ship's register, until such further evidence is rendered necessary in consequence of the adduction of some contrary proof on the other side (a). But in actions *against* shipowners for stores, repairs, wages, &c., entries in the custom-house books of the port of London, and of the outport to which a ship belongs, stating that she was transferred to A. by B., the original owner, were held not sufficient evidence to prove that A. was liable as registered owner, there not being any proof to connect A. with the entries (b). The register was also no evidence of ownership, without proof of identity (c). So the production of the register was not sufficient without showing that the defendant had assented to the sale, &c., and adopted the character of owner (d). But now, by the Merchant Shipping Act, 1854, sect. 107 (see *ante*, p. 1180), the register is *prima facie* proof of all matters contained therein.

To determine what evidence will be sufficient to prove a conversion in the defendant, it must be known in what manner the goods came to his hands (e); for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; but proof of a tortious taking will supersede the necessity of proving a demand and refusal; for where the taking is unlawful, it is of itself a conversion. So, likewise, if an actual conversion be proved, it is not necessary to prove a demand and refusal (f). A mere non-delivery of goods, which have been placed in the defendant's hands for a specific purpose, will not amount to a tortious conversion. Hence, where goods have been delivered to a manufacturer, in order that he may do something to the goods in the course of his business, and then return them; if the manufacturer, upon being applied to for the goods, merely makes excuses for not having returned them, and does not absolutely refuse to deliver them, *trover* cannot be maintained: the proper remedy is an action of assumpsit for non-performance of the contract (g). Where plaintiffs sold goods to T., who paid for them, and was to take them away, but defendant becoming possessed of the place in which the goods were deposited, plaintiffs' attorney, accompanied by T., demanded them of defendant, telling him that they belonged to plaintiffs, and that they had sold them to T.; to which defendant answered that he would not deliver them to any

(a) *Robertson v. French*, 4 East, 130.
See *Sutton v. Buck*, 2 Taunt. 302.

(b) *Fraser v. Hopkins*, 2 Campb. 170.

(c) *Myers v. Willis*, 17 C. B. 77.

(d) *Smith v. Fuge*, 3 Campb. 456;

Strother v. Willan, 4 Campb. 24, *acc.*

(e) *Per Cur.*, in *Bruen v. Roe*, 1 Sid. 264.

(f) *Forsdick v. Collins*, 1 Sta. 173.

(g) *Severin v. Keppell*, 4 Esp. 157.

person whatsoever; and afterwards plaintiff repaid the money to T., and brought trover against defendant: it was held, that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiffs, after they had repaid the money to T., was not necessary (*h*). Where A. having purchased a stolen horse (not in market overt), sent it for sale to a repository kept by B., and the owner of the horse finding it there, demanded it of B. in the presence of A., when B. refused to deliver it up; this was held evidence of a joint conversion (*i*). A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none (*k*). Hence, where the captain of a ship, who had taken goods on freight and claimed to have a lien upon them, delivered them to a bailee; and the real owner demanded them of the bailee, who refused to deliver them without the directions of the bailor: it was held that, the bailor not having any lien, the refusal by the bailee was sufficient evidence of a conversion (*l*). Goods consigned to A., upon their arrival, are landed on the defendant's wharf; the plaintiff, in an action of trover, may prove his title by parol, although the bill of lading, which has been indorsed to him, cannot be received in evidence for want of a stamp (*m*). A trader, on the eve of bankruptcy, made a collusive sale of his goods to A.: it was held, that the assignees could not maintain trover for the goods against A., without proving a demand and refusal (*n*). But the sale of a ship, which was afterwards lost at sea, made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, has been held to be a sufficient conversion to enable the assignees to maintain trover, without proving a demand and refusal (*o*).

A demand and refusal is only evidence to induce a jury to presume a conversion; and, therefore, if the jury find a special verdict, that there was a demand and refusal, the court cannot adjudge it to be a conversion (*p*). A demand and refusal is not evidence of a conversion, where it is apparent that the defendant has not been guilty of a conversion: as in the case of the defendant having cut down the trees of the plaintiff, and left them lying in the plaintiff's ground; for in such case it is clear that there has not been any conversion, if they continue there (*q*). So the return of goods of a third party, which have been seized under a distress, but remained unsold, to the premises whence they were taken, is not a conversion, for the bailiff is not bound to restore the goods to the right owner (*r*). But the jury may infer a refusal, and therefore a con-

(*h*) *Pattison v. Robinson*, 5 M. & S. 310.

105.

(*i*) *Lee v. Bayes*, 18 C. B. 599.

(*k*) See an exception to this rule, case of the *Exeter carrier*, ante, p. 1312, n.

(*l*) *Wilson v. Anderton*, 1 B. & Ad. 450. See *Catterall v. Kenyon*, 3 Q. B.

(*m*) *Davis v. Reynolds*, 1 Sta. 115.

(*n*) *Nixon v. Jenkins*, 2 H. Bl. 135.

(*o*) *Bloxam v. Hubbard*, 5 East, 407.

(*p*) *Per Coke*, C. J., 10 Rep. 56, b.

(*q*) *Per Cur.*, 2 Mod. 245.

(*r*) *Evans v. Wright*, 27 L. J., Ex. 50.

version from continued silence (*s*). So, if the defendant refuse to give up deeds, except on a condition which he has no right to impose, that is tantamount to an absolute refusal (*t*). If A., into whose possession goods happen to come, being ignorant that B. is the real owner, refuses to deliver them to B., until he proves that he is the real owner; such qualified refusal is not evidence of a conversion (*u*). But where the defendant, a wharfinger, on being shown the delivery warrant, refused to deliver up to the plaintiff wine that had been purchased by him, on the ground that an attachment from the Lord Mayor's court had been served upon him upon the goods of the former owner, and he asked for time to make enquiries, it was held that there was evidence of a conversion; but it was for the jury to consider whether the defendant had a *bond fide* doubt as to the plaintiff's title, and whether a reasonable time had elapsed for clearing up that doubt before action brought (*v*).

In order to make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded. Hence, where in trover for a deed, the evidence was, that when the deed was demanded from the defendant, he said he would not deliver it up, but that it was in the hands of his attorney, who had a lien upon it; this was held insufficient (*x*). Where a watch, the subject-matter of the action, had been given by the defendant to a third person, but had been subsequently handed back to the defendant for the purpose of being pawned, and, nine months afterwards, upon demand being made upon the defendant, she said, "I shall not talk to you any more, but shall see my solicitor;" it was held, that this was sufficient evidence of a conversion, and of the watch being in her possession at the time of the demand (*y*). So where, in trover for a bill of exchange, it was proved that the defendant had said "he could not give it up, because it had been burnt," and the defendant was not called, and the jury found a verdict for the plaintiff; it was held, that the verdict was justified by the evidence (*z*).

In trover against a carrier, a refusal to deliver is not evidence of a conversion, if it appears clearly that the goods have been lost through negligence; but if that does not appear, or if the carrier had the goods in his custody when he refused to deliver them, it is good evidence of a conversion (*a*). "If a carrier says he has the

(*s*) *Per Park, J., Anthony v. Haney*, 8 Bingham 193; *Watkins v. Woolley*, Gow, 69.

(*t*) *Davies v. Vernon*, 6 Q. B. 443.

(*u*) *Green v. Dunn*, 3 Campbell 215, n.; *Solomon v. Dawes*, 1 Esp. 83; *Vaughan v. Watt*, 6 M. & W. 497. See *ante*, p. 1299.

(*v*) *Pillott v. Wilkinson*, 34 L. J., Ex.

22 (in error).

(*x*) *Smith v. Young*, 1 Campbell 439.

(*y*) *Richmond v. Nicholson*, 8 Scott, 134.

(*z*) *M'Kewen v. Cotching*, 27 L. J., Ex. 41.

(*a*) *Anon.*, Salk. 655; *Ross v. Johnson*, 5 Burr. 2825; *Dewell v. Moxon*, 1 Taunt. 391. See *ante*, p. 364.

goods in his warehouse and refuses to deliver them, that will be evidence of a conversion, and trover may be maintained, but not for a bare non-delivery, without any such refusal." *Per* Lord *Ellenborough*, C. J. (b). But he may give in evidence the detaining of the goods for his hire (c). So he may give in evidence, that the goods were stolen; for then he is not guilty of a conversion, though he will be liable in an action on the case to make compensation for the loss of the goods (d). If A. sends goods by B., a common carrier, to be delivered to C., proof that B. asserted he had delivered the goods to C., whereas in truth C. had never received them, is not sufficient evidence of a conversion to support trover against B. (e).

In trover for a horse in an innkeeper's possession, a refusal is not a conversion, or evidence of a conversion, unless the plaintiff tender a sum sufficient for the keep of the horse, and the jury is to judge of the sufficiency of the tender (f). In *Johnson v. Hill*, 3 Sta. 172, where A., under the colour of a legal proceeding, having wrongfully seized the horse of B., took it to an inn, where it was kept for several days. The landlord refused to deliver up the horse to B., upon a demand made soon after the delivery to him; but a few days afterwards offered to give up the horse to B. on being paid ten shillings for the keep. The chief justice was of opinion, that if the landlord knew, at the time the horse was delivered into his custody, that A. was not the owner of the property, but a mere wrong-doer, he made himself a party to the wrongful act of A., and could not insist on any recompense for keeping the horse; and this being left to the jury, they found for B., the plaintiff. But if A. put a horse to pasture with B., and afterwards sell him to C., who brings trover against B., B. cannot detain the horse against C., the purchaser, until he be paid, but must have recourse to his action against A. (g). Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view of giving him a preference, and the amount due on the bills was received by him after the bankruptcy; it was held, that the receipt of the money did not amount to a conversion, and consequently that it was necessary to prove a demand of the bills and a refusal (h).

In trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all (i). Possession ought to be proved in the defendant himself, for delivery to a servant is not sufficient, if the goods do not come to

(b) *Severin v. Keppel*, 4 Esp. 157.

(c) *Skinner v. Upshaw*, Ld. Raym. 752.
See ante, p. 1312.

(d) *George v. Wyburn*, 1 Roll. Abr. 6,
(L.) pl. 4.

(e) *Attersol v. Briant*, 1 Campb. 409.

(f) *Anon.*, 2 Show. 161.

(g) *Chapman v. Allen*, Cro. Car. 271.

(h) *Jones v. Fort*, 9 B. & C. 764.

(i) *Nicoll v. Glennie*, 1 M. & S. 588.

the hands of the defendant; unless the servant be employed by his master to receive goods for him, and the goods are delivered in the way of his trade (*k*); as if a pawn be delivered to a pawnbroker's servant (*l*). In trover against defendant for not delivering some wine deposited with her as a security for an advance of money; it was held, that it was not sufficient evidence of a conversion, to show, that her son, who acted as her *general* agent, refused to give it up; and that it was necessary to prove that such agent acted under a special direction, in order to make the defendant liable as a wrong-doer (*m*).

Of Staying the Proceedings.

Formerly, if the defendant was desirous of staying the proceedings against him, by bringing the subject-matter of the action into court, and undertaking to pay the costs incurred, the court refused to listen to the application (*n*); unless the action was brought for money (*o*). But of late years it has been usual to grant applications of this kind, when a proper case has been brought before the court (*p*). But not where it appears that the goods are altered, and of less value than they were when taken (*q*). Where the goods are ponderous, the court will grant a rule to show cause, why, on the delivery of the goods to the plaintiff, and on payment of costs, the proceedings should not be stayed (*r*).

V. Verdict—Damages.

Verdict.—The verdict in trover is divisible, and should be entered for the defendant, and not in reduction of the plaintiff's damages only, as to any articles that are distinguishable and severable, according to the description of them in the declaration, and the evidence given at the trial (*s*).

Damages.—In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion (*t*). In trover for an unstamped guarantee mutilated by the defendant, the plaintiff is entitled to such damages as he might have recovered in an

(*k*) Bull. N. P. 44.

(*l*) *Jones v. Hart*, Salk. 441.

(*m*) *Pothonier v. Dawson*, Holt, 383.

(*n*) *Olivant v. Perineau*, 2 Str. 1191.

(*o*) *Anon.*, Str. 142.

(*p*) *Everard v. Lathbury*, Bull. N. P. 49; per Lord Kenyon, C. J., 7 T. R. 54; *Pickering v. Truste*, where this doctrine was extended to trespass for taking

goods.

(*q*) *Royden v. Batty*, Barnes, 284; *Fisher v. Prince*, 3 Burr. 1363.

(*r*) *Cooke v. Holgate*, Barnes, 281; *Watts v. Phipps*, Bull. N. P. 49.

(*s*) *Frenshey v. Wells*, 26 L. J., Ex. 228.

(*t*) *Mercer v. Jones*, 3 Campb. 477.

action on the guarantee (*u*). But the case of *Mercer v. Jones* was doubted by *Abbott*, C. J. (*x*); and it was held, that in the case of goods, at all events, the jury were not limited to the value of the article at the time of the conversion, but might find its value at a subsequent time at their discretion (*y*). In an action by mortgagor in possession of goods against his mortgagee the measure of damage is the value of his interest (*z*); but in an action against a stranger he is entitled to receive their full value (*a*).

Where, after an act of bankruptcy, a sheriff seizes and sells goods, in trover by the assignees, the jury may deduct in their estimate of damages, the expenses of the sale, for the plaintiffs themselves would have been obliged to sell (*b*). Where the owner of adjoining land had worked coal-mines within the land of the plaintiff; it was held, that, the plaintiff being entitled to the coals as chattels, the proper estimate of damages was the value of the coals when gotten, without deducting the expense of getting them (*c*). But if the defendant has subsequently removed the coal, and brought it to the pit's mouth, the plaintiff is not entitled to the increased value thus given to it; in other words, the plaintiff is entitled to recover the value of the coal at the pit's mouth, deducting the expense incurred by the defendant in removing it (which the plaintiff must himself have incurred), but not of getting it, which was the defendant's wrongful act (*d*). If, however, the defendant had acted under a fair and honest belief of right, as in the case of a disputed title, it is different; and the rule of damages in that case is the fair value of the coals as if the coal-field had been purchased from the plaintiff (*e*). If the goods, while in the hands of the defendant, have been seized for rent, which the plaintiff is liable to pay, and which the defendant has paid to obtain the release of the goods, the defendant is entitled to deduct the amount so paid from the verdict found for the plaintiff (*f*). Defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them: the plaintiffs accepted the goods without condition: it was held, that they could not recover in the action more than nominal damages; at all events, not without alleging special matter in the declaration (*g*).

By 3 & 4 Will. IV. c. 42, s. 29, in all actions of trover, the jury, on the trial of any issue, or on any inquisition of damages, may, if

(*u*) *M'Leod v. M'Ghie*, 2 M. & G. 326.

(*x*) *Greening v. Wilkinson*, 1 C. & P. 625.

(*y*) *Whitehouse v. Atkinson*, 3 C. & P. 344, acc. See *Edmondson v. Wattall*, 17 B. (N. S.) 280.

(*z*) *Brierly v. Kendall*, 17 Q. B. 937.

(*a*) *Turner v. Hardeastle*, 31 L. J., C. P. 193.

(*b*) *Clarke v. Nicholson*, 1 C. M. & R. 724.

(*c*) *Martin v. Porter*, 5 M. & W. 351.

(*d*) *Morgan v. Powell*, 3 Q. B. 278.

(*e*) *Wood v. Morewood*, 3 Q. B. 441; per Parke, B., in *Wild v. Holt*, 9 M. & W. 672. See ante, p. 1274.

(*f*) *Plevin v. Marshall*, 10 Bingh. 24.

(*g*) *Moon v. Raphael*, 2 B. N. C. 310.

they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion.

Judgment.—The judgment in this action is for the recovery of damages only (*h*), and in this respect it differs from the judgment in the analogous action of detinue, which is for the recovery of the *goods in question*, or the value thereof, if the plaintiff cannot have the goods (*i*).

Although if the plaintiff in an action of trover has obtained satisfaction, he cannot afterwards bring trover in respect of the same chattel against a party to whom the defendant has transferred it; yet if he has not obtained satisfaction he may do so (*k*).

(*h*) *Knight v. Bourne*, Cro. Eliz. 116.

(*i*) See *ante*, tit. "Detinue" III.

(*k*) *Marston v. Phillips*, 9 L. J. (N.S.) 289.

CHAPTER XL.

USE AND OCCUPATION (a).

FORMERLY an action of assumpsit (b) for rent arrear upon a parol lease for years could not have been maintained, either pending (c), or after the expiration of the term (d), because it was considered as a real contract: the only remedies were by distress or action of debt (e). But on a mere promise to pay a sum of money (f), or so much as the plaintiff deserved to have (g), in consideration of the plaintiff's permitting the defendant to occupy lands, &c., an action of assumpsit might have been maintained by the common law. In this case the objection as to the contract being *real*, was removed by considering the permission to occupy as not amounting to a lease, and the mere promise to pay a sum of money in consideration of such permission, as not amounting to a reservation of rent.

The action for use and occupation is one of *contract*, and is founded on the relationship of landlord and tenant; it, therefore, requires evidence of an occupation by the permission of, and under a contract with, *the plaintiff*. The mere assent of the plaintiff to a letting by a third person is not sufficient (h). "If the court knew nothing in such an action, except that the plaintiff has the title to the land, and that the defendant has enjoyed the land, as the law presumes that a man is to pay for his enjoyment of the land, to the party who is entitled to it, the court, under such circumstances, will support the action for use and occupation. But if the taking possession was by a trespasser, a trespass cannot be turned into a contract, upon the doctrine as to waiving a tort and suing on the ground of an implied contract. So, if the party sued is in possession, having come in and claiming to be in under another person, there can be no action for use and occupation, for you cannot turn a contract with one person into a contract with

{ (a) See *ante*, p. 545.

(b) *Brett v. Read*, Sir W. Jones, 329; Cro. Car. 343.

(c) 1 Roll. Abr. 7, (O.) pl. 1.

(d) *Ibid.*, pl. 2. See also *Green v. Harrington*, Hob. 284; Hutt. 34, S. C.

(e) The remedy, however, by debt or assumpsit, so far as the *indebitatus* counts are concerned, is now identical. See *ante*, p. 82.

(f) *Dartnall v. Morgan*, Cro. Jac. 598; *Chapman v. Southwicke*, 1 Lev. 204; *Johnson v. May*, 3 Lev. 150.

(g) *How v. Norton*, 1 Lev. 179; *Mason v. Welland*, Skin. 238, 242.

(h) *Churchward v. Ford*, 26 L. J., Ex. 354; 2 H. & N. 446. In this case a notice from the plaintiff to the defendant to pay rent to him was proved. See *post*, p. 1338.

another." *Per Pollock, C. B., S. C.* Where, however, a lease was granted by a writing, not under seal, which contained an undertaking by the lessor, for himself and assigns, for quiet enjoyment, it was held, that his assignee might maintain the action, for, the lessor having granted for himself and assigns, the permission of any person who might become his assignee was virtually included (*i*). Though the relationship of landlord and tenant must exist, it is not necessary that there should be any reversion in the plaintiff (*j*).

A., a tenant from year to year, under a parol demise, assigned all his interest to B. The lessor did not accept B. as tenant, and on default being made in payment of the rent sued A. for use and occupation. It was held that A. was liable in that form of action (*k*).

In order more effectually to obviate the difficulties which occurred in the recovery of rent, where the demise was not by deed, it was enacted, by 11 Geo. II. c. 19, s. 14, "that landlords, *where the agreement is not by deed*, may recover a reasonable satisfaction for the lands, tenements, or hereditaments held *or* occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and if, in evidence on the trial of such action, any parol demise, or any agreement (not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof, as an evidence of the quantum of the damages to be recovered." Under this statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises, which have been holden and enjoyed under the demise, by action for the use and occupation: and it is provided on his behalf, that, if the demise be produced against him, it shall not defeat his action, as it would have done before the statute; but the fixed rent shall be only used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. A reasonable satisfaction for the use and occupation is the thing intended to be given; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise), is the proper form in which such reasonable satisfaction is to be recovered; but, the reasonable satisfaction, which in its own nature must apply to something specific by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which, in its own nature, is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the statute to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the

(*i*) *Standen v. Christmas*, 10 Q. B. 135.

(*k*) *Shine v. Dillon*, Ir. Rep., 1 C. L. 277.

(*j*) *Pollock v. Stacey*, 9 Q. B. 1033.

contract for rent. The statute meant to provide an easy remedy in the simple cases of actual occupation, leaving other more complicated cases to their ordinary remedy (*l*).

The statute says, "lands, *tenements*, and *hereditaments*." The action, therefore, will lie for the use and occupation of furniture (*m*), or on incorporeal hereditament, *e. g.* a fishery (*n*).

The statute provides a remedy in such cases only, where the agreement is not by deed; but it has been held, that, where the defendant held under a mere agreement for a lease, which did not amount to an actual demise, the plaintiff might maintain an action for the use and occupation, although such agreement was by deed (*o*). So where a lease containing the usual words "signed, sealed, and delivered," was executed by both parties, pursuant to a previous agreement, by which it was provided, that the lessee should pay the lessor (the plaintiff) 100*l.* for the plaintiff's goodwill and fixtures, but that the lease should not be delivered, and should remain in the plaintiff's possession until payment of that sum; it was held, that the jury were warranted in finding, that there had been no delivery of the deed so as to operate as a lease; that a tenancy from year to year only, therefore existed, and that the defendant (who was the assignee in bankruptcy of the lessee, and had accepted the lease) was liable in an action for use and occupation (*p*).

A corporation aggregate may sue for use and occupation, where the tenant has held premises under them without deed, and previously paid rent (*q*). So they may be sued, where they have actually occupied land by the permission of the owner, though there be no contract under seal; and where the corporation is a railway company (which is authorized by the 97th sect. of the 8 & 9 Vict. c. 16, to make, by their directors, valid contracts by parol, in cases where private persons could make such contracts), such parol contract may, in the absence of evidence to the contrary, be presumed (*r*).

In an action for use and occupation of apartments in the plaintiff's house during half a year, it appeared that the rent was claimed in consequence of the defendant having neglected to give a notice to quit; the defence set up was, that the plaintiff, after the defendant had quitted, had put up a bill in the window: but Lord *Kenyon*, C. J., expressed an opinion, that the defence insisted

(*l*) *Per Eyre*, C. J., delivering judgment in *Naish v. Tatlock*, 2 H. Bl. 323.

(*m*) *Salmon v. Matthews*, 8 M. & W. 827.

(*n*) *Holford v. Pritchard*, 3 Ex. 793. See Form 10, Sched. B. of Com. Law Proc. Act, 1852.

(*o*) *Elliott v. Rogers*, 4 Esp. 59; *Ba-*

nister v. Usborne, Peake's Add. Ca. 76.

(*p*) *Gudgen v. Besset*, 26 L. J., Q. B. 36; 6 E. & B. 986, S. C.

(*q*) *Mayor of Stafford v. Till*, 4 Bingh. 75.

(*r*) *Lowe v. London and North Western Railway*, 18 Q. B. 632. See further, *ante*, p. 83.

on would afford no answer to the plaintiff's action. It was for the benefit of the defendant that the apartments should be let; nor would he infer from the circumstance of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to show it, and not merely an act of so equivocal a kind (s).

The delivery of the keys of the house by an agent of the tenant to a female servant at the house of the landlord, was held by Lord *Ellenborough*, C. J., not sufficient to prove a determination of the tenancy, the female servant not having been called, and it not appearing that the keys had ever reached the plaintiff and been accepted by him (t). A tenancy from year to year, created by parol, is not determined by a parol license from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly (u). The Statute of Frauds requires a deed or note in writing, or a surrender by operation of law (x). The necessity of a written surrender may be dispensed with by the admission of another tenant; and where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant, who occupied a short time; it was held, that the lessor could not recover in an action for use and occupation against the lessee, for a subsequent portion of the year, during which the apartments had been unoccupied; for the lessor, having precluded the defendant from occupying the apartments by letting them to another, must be taken to have rescinded the agreement, and to have dispensed with the necessity of a surrender (y). If the lessee accepts from the lessor a new lease, that is a surrender of the old one, even though the new lease be for a shorter term or by parol. So where there has been an actual taking of possession by the landlord with the assent of the tenant, the case falls within the reason of the authorities, and amounts to a surrender by act and operation of law (z). Thus, where the defendant took premises from the plaintiffs under a written agreement; before any rent became due, the defendant's wife delivered up the key to one of the plaintiffs (who alone had acted in the matter, except as to the execution of the agreement), who accepted it; it was held, that this amounted to a surrender by operation of law, and that the two lessors were bound by the acquiescence of the one (a). So where A. demised

(s) *Redpath v. Roberts*, 3 Esp. 225. This doctrine was recognized by Lord *Ellenborough*, C. J., in *Mills v. Bottomly*, Middx. Sitt. after M. T. 58 Geo. III., B. R.

(t) *Harland v. Bromley*, 1 Stark. 455.

(u) *Mollett v. Brayne*, 2 Campb. 104. See remark of *Gibbs*, C. J., on this case, in *Whitehead v. Clifford*, 5 Taunt. 519. In *Walls v. Atcheson*, 2 C. & P. 268,

Park, J., says, that he should like to have this case of *Mollett v. Brayne* reconsidered.

(x) *Thomas v. Cook*, 2 B. & Ald. 119, cited by *Patteson*, J., in *Gore v. Wright*, 8 A. & E. 121. See *ante*, p. 763.

(y) *Walls v. Atcheson*, 3 Bingh. 462.

(z) *Per Tindal*, C. J., in *Dodd v. Acklom*, 7 Scott's N. R. 415.

(a) *Dodd v. Acklom*, 7 Scott's N. R. 415.

to B. part of a house for a year, at a rent payable quarterly, B. entered at Christmas, and paid a quarter's rent at Lady-day. In April, a dispute having arisen between A. and B., B. said she would quit, A. told her she might go when she pleased, and he should be glad to get rid of her. B. accordingly quitted and delivered the keys of the rooms to A. on the 19th of April, who accepted them. It was held, that A. could not recover rent *pro rata* for so long a time as B. had occupied: for where there is an express contract, none can be implied; and A., having destroyed his right to recover the rent, according to the contract, had destroyed it altogether (b). The defendant was tenant from year to year of a house and premises, at a rent payable half-yearly, on the 1st of April and 1st of October. The premises being required for the purposes of a railway, the railway company, in pursuance of a power given by their act of parliament, gave the defendant six months' notice to quit, which expired on the 28th of July. The defendant gave up possession to the company accordingly on that day, without obtaining or requiring compensation for his interest in the premises, which he was entitled to under the act; it was held, that he was liable for the rent of the half-year ending on the following 1st of October (c).

Although an agreement may be void by the Statute of Frauds, as where a lease is granted in reversion for three years: yet if the tenant take possession under it, he becomes tenant at will, and recourse may be had to the original agreement to calculate the amount of the rent (d). But where a lessee took a farm under an agreement which he never signed, and the terms of which his lessor in a material point failed to fulfil; in an action for the use and occupation of the farm, it was held, that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement (e). Where premises were let to B. for a term determinable by a notice to quit, and pending such term, C. applied to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agreed to stand in B.'s place and offered to pay rent; it was held, that (although B.'s term had not been determined either by notice to quit or a surrender in writing) A. might maintain an action for use and occupation against C., and that C. could not set up B.'s title as a defence to that action (f). But where the defendant, in 1799, agreed by writing to take certain premises for seventeen years, at a yearly rent, and entered: in 1813, the plaintiffs contracted to sell the fee to A., who thereupon bought from the defendant the residue of his term, and, without the assent of the plaintiffs, put in a new tenant

(b) *Grinman v. Legge*, 8 B. & C. 324, cited by *Williams, J.*, in *Slack v. Sharpe*, 8 A. & E. 374,

(c) *Wainwright v. Ramsden*, 5 M. & W. 602.

(d) *De Medina v. Polson*, Holt. 47.

(e) *Tomlinson v. Day*, 2 B. & B. 680.

(f) *Phipps v. Sculthorpe*, 1 B. & Ald.

50. See *Hyde v. Moakes*, 5 C. & P. 42.

who occupied for two years; the contract for sale was then rescinded; it was held, that the plaintiffs were entitled to recover from the defendant, in an action for use and occupation, the rent from 1813 to the end of the original term, as there had not been any surrender in writing of his interest, and as the plaintiffs had not assented to the change of tenancy (*g*). "When a lease is expired, the tenant's responsibility is not at an end; for, if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and may hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term" (*h*). Tenants are bound to give up possession of the premises at the expiration of their terms: if they omit to do so, and retain possession, either by themselves or their under-tenants, they are liable to pay rent to their landlord, unless, indeed, he has consented to accept other parties as his tenants instead of them (*i*). So where premises are let for a term to A. and B., and A. holds over after the expiration of the term with B.'s assent, both are liable in an action for use and occupation, for so long a time as A. continues actually to occupy, but no longer (*k*). But it is doubtful whether, while premises are let to two parties, one of whom is desirous of giving up possession, and notifies his desire to the other, who nevertheless holds over, the party who is out of possession can be made liable to an action for use and occupation (*l*).

The words of the statute are, that the plaintiff may, "recover a reasonable satisfaction for the lands, &c., held *or* occupied by the defendant in an action for use and occupation." Hence use and occupation lies for a constructive, as well as an actual occupation (*m*). Thus, where a person, who had agreed to rent a house, sent in a woman to clean it, and workmen to paper one of the rooms; this was held sufficient evidence of occupation to go to the jury in an action for use and occupation (*n*). So the putting up a board for the purpose of letting houses, by the person who had agreed to become tenant of them, is sufficient (*o*). But there must be an actual entry; a mere *interesse termini* is not sufficient. Thus, a lessee who has not entered to take possession as tenant, is not liable for use and occupation (*p*), nor is a person who has only agreed to take lodgings (*q*). And the meaning of a "constructive occupation" must be explained to the jury (*r*). An occupation by the

(*g*) *Matthews v. Sarwell*, 8 Taunt. 270; *Ibbs v. Richardson*, 9 A. & E. 849.

(*h*) *Per Lord Kenyon*, C. J., in *Harding v. Crethorne*, 1 Esp. 56, recognized in *Christy v. Tancred*, 7 M. & W. 127.

(*i*) *Per Parke*, B., *Christy v. Tancred*; *Waring v. King*, 8 M. & W. 571.

(*k*) *Christy v. Tancred*, 9 M. & W. 438; 12 M. & W. 316, *S. C.*

(*l*) *Per Alderson*, B., *S. C.* 9 M. & W. 448.

(*m*) *Pinero v. Judson*, 6 Bingh. 206.

(*n*) *Smith v. Twoart*, 2 M. & G. 841.

(*o*) *Sullivan v. Jones*, 3 C. & P. 579.

(*p*) *Lowe v. Ross*, 5 Ex. 553.

(*q*) *Edge v. Strafford*, 1 C. & J. 391.

(*r*) *Towne v. D'Heinrick*, 13 C. B. 892.

tenant of the defendant is, as far as respects the plaintiff, an occupation by the defendant himself. Hence, if A. agree to let his lands to B., who permits C. to occupy them, A. may recover the rent in an action against B. for the use and occupation (s). So rent accruing after premises are burnt down, may be recovered, although no longer inhabited by the tenant, inasmuch as he must be taken still to *hold* the land, and that is sufficient to satisfy the words of the statute (t). So where defendants, as tenants from year to year, occupied a second floor, which during their occupation was consumed by an accidental fire; it was held, that, notwithstanding the destruction of the premises, they were liable to an action for use and occupation for the period which elapsed between the fire and the regular determination of the tenancy (u); *Tindal*, C. J., observing, that if there had been an agreement in writing between the parties for a term of years, no question could have been made; but that the term of years still existed, and a tenancy from year to year, until it is determined by a notice to quit, is as to its legal character and consequences the same as a term for years. If the landlord rebuilds, and the tenant chooses to re-enter and to continue his occupation of the new building, there seems nothing to prevent him, as no notice to quit has been given on either side; and if so, the obligation of each of the parties must be reciprocal, and the tenant must make satisfaction for the rent. So where a second floor of a house was occupied at a rent payable quarterly, and during the currency of a quarter the house was burnt; it was held, that as, in the action for use and occupation, the rent is considered as accruing *de die in diem*, the plaintiff was entitled to recover for the occupation at least up to the time of the fire taking place; *Patteson*, J., observed, that the defendant is in this dilemma,—that if there is an express demise, he is liable for the rent, notwithstanding the fire; if there is not, he is liable for the period during which the premises were actually occupied (x).

Where the defendant has not obtained possession under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. The defendant entered upon a leasehold cottage under J. S., who soon after mortgaged it to W. S., and in 1806 assigned the equity of redemption to the plaintiff. On the 18th of July, 1808, W. S. assigned the legal estate in the premises to the plaintiff. The defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended, that although a person having the equitable estate only, could not, perhaps, maintain use and occupation with-

(s) *Bull v. Sibbs*, 8 T. R. 327. And B. may in his turn recover against C., unless A. has consented to receive C. as his tenant, and to exonerate B. *Dawson*

v. *Lamb*, 3 C. & K. 269.

(t) *Baker v. Holtzapfel*, 4 Taunt. 45.

(u) *Izon v. Gorton*, 5 B. N. C. 501.

(x) *Packer v. Gibbins*, 1 Q. B. 421.

out privity of contract, yet, the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him, so as to entitle him to two years' rent. But Lord *Ellenborough* clearly held, that he could only recover rent for the period between the 18th of July and Michaelmas-day 1808 (y). His Lordship likewise ruled in the same case that the defendant, who, just before he quitted, had been distrained upon by the ground landlord for several years' ground rent, amounting to a much larger sum than was due to the plaintiff, could only set off a part of the sum, proportioned to the period during which the plaintiff had the legal estate; and that the fact of the plaintiff having brought an ejectment for the same premises, laying a demise on the 18th of July, 1808, was no bar to the present action, but was only matter of special application to the court. Where defendant, in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants, and received rent from others; it was held, that the occupation by the tenants was an occupation by the defendant, as much as if the defendant were in the actual possession himself; and it being one entire holding, under the expectation of a demise of the whole, the defendant was liable for the whole amount (z).

In an action against the assignees of B., a bankrupt, the declaration stated, that the defendants, on such a day, were indebted to the plaintiff in £—— for the use and occupation of two houses, &c., before time occupied, *as well by the bankrupt, whose estate therein the defendants afterwards had, as by the defendants, at their special instance and request*, for one year then elapsed, and as tenants thereof respectively, to the plaintiff, and by his permission. The facts were, that after B. had occupied the premises during part of the year, under an agreement to pay £—— a year for them, he became a bankrupt, whereupon the defendants, his assignees, entered into possession and continued in possession for the remainder of the year. A proportion of the annual rent for that part of the year during which the defendants were in possession, was paid into court. It was held, that if the plaintiff could recover at all in this form of action against one person for the use and occupation of another, (as to which the court would not give any opinion,) it must be on the ground of that occupation having been permitted at the defendant's request, and that request must be proved: that the words "at the special instance and request of the defendants," were in this case words of substance, and operative, connecting the occupation of the defendants, for which they were bound to make a satisfaction, with the occupation of B., a stranger, for whose occupation, *primâ facie* at least, the defendants were not liable; that in point of fact it was not at the request of

(y) *Cobb v. Carpenter*, 2 Campb. 13, n.(z) *Neal v. Swind*, 2 Cr. & J. 377.

the defendants that B. had been permitted to occupy; the defendants had no relation to B., but as his assignees, and that relation did not commence until the close of B.'s occupation; that relation, therefore, alone, could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment, that he had been permitted to occupy "at the request" of the defendants, was therefore substance, and not mere form, and as the plaintiff had failed in the proof of it, he was not entitled to recover from the defendants the rent due for B.'s occupation (a). The reasoning of the above decision equally applies to the modern form of declaring for use and occupation, *viz.*, "for money payable by the defendant to the plaintiff for the defendant's use by the plaintiff's permission of a house of the plaintiff;" for it would not be by the permission of the assignees any more than at their request that the bankrupt occupied before his bankruptcy. Assuming, however, there was a term, the assignees, after they accepted it, would be liable for any rent actually accruing after their acceptance, though in respect of a period which had partly elapsed prior to such acceptance. But although the letting was not by deed, the declaration should not be for use and occupation, but specially on the term demised to the bankrupt and accepted by the assignees.

The defendant contracted to purchase of the plaintiff the lease of a house, and on payment of the purchase-money, was permitted to take possession. A few months afterwards, the plaintiff not having made out a good title, defendant declared his intention to rescind the contract; he accordingly quitted possession of the house, and brought an action for money had and received against the plaintiff, and recovered the whole of the purchase-money and the expenses of investigating the title. The plaintiff then brought an action for use and occupation against the defendant: but it was held, that it would not lie; *Mansfield*, C. J., observing, that a contract could not arise by implication of law under circumstances, the occurrence of which neither of the parties ever had in their contemplation (b). And this rule holds, although the defendant may not have paid the purchase-money, and although the occupation is expressly found to have been beneficial to the defendant, for the plaintiff cannot convert a person who enters as purchaser into a tenant by his own wrongful act in not completing the contract of sale (c). But where a party was let into possession of land under a contract of purchase, which afterwards went off; it was held, that he was liable in this form of action at the suit of the vendor, for the period during which he continued in possession *after* the contract went off (d); for where one person is the owner of land and another person the

(a) *Naish v. Tatlock*, 2 H. Bl. 319.

611.

(b) *Kirland v. Pounsett*, 2 Taunt. 145.(d) *Howard v. Shaw*, 8 M. & W. 118.(c) *Winterbottom v. Ingham*, 7 Q. B.

occupier, and nothing appears to the contrary, a contract to pay what the land is reasonably worth may be implied (*e*).

At the trial, it appeared that plaintiff had recovered a judgment against A., upon which, in E. T. 1826, an elegit was issued. The sheriff returned an inquisition, by which it was found that A., at the time of the judgment, was seised, for life, of land in the occupation of defendant, (being the land in respect of the rent of which the present action was brought,) and in September, plaintiff served defendant with notice of the inquisition, and with a demand of the rent then due. A large sum was then due; and defendant, upon being served, said that A. was his landlord, and that he paid his rent to him. On the part of the defendant, it was proved, that A. had not any legal interest in the land; that it was vested in trustees for a long term of years, in order, among other purposes, to raise a large sum of money for the aunt of A., which money had not been raised; in the meantime, A. was permitted to receive the rents and profits. The plaintiff was nonsuited; and the court confirmed the opinion of the C. J., on the ground that the plaintiff could not recover in ejectment; nor in an action for the rent, because he could not claim the rent, unless he had a right to enter; that although the inquisition found that A. was seised, yet a stranger to the inquisition was not bound to traverse it; he might dispute its correctness in any other way. A., however, had nothing in the premises but a joint equitable interest, of which a court of equity alone could take cognizance (*f*).

Bringing an ejectment will not be a bar to an action for use and occupation for rent due *before* the date mentioned in the writ (*g*); but rent due subsequent to that day cannot be recovered in an action for use and occupation (*h*).

The defendant in this action will not be allowed to impeach the title of the plaintiff, by whose permission he entered upon and occupied the tenement demised. Hence a plea of *nil habuit in tenementis* cannot be pleaded (*i*). A. hired apartments by the year

(*e*) *Hellyer v. Silcox*, 19 L. J., Q. B. 295.

(*f*) *Harris v. Booker*, 4 Bingh. 96.

(*g*) *Birch v. Wright*, 1 T. R. 378.

(*h*) *Per Buller, J.*, S. C. 1 T. R. 388.

(*i*) *Richards v. Holditch*, H. 13 Geo. II., cited in *Lewis v. Wallis*, Say. R. 13; *Curtis v. Spitty*, 1 B. N. C. 15. The case of *Richards v. Holditch* was this:—Error to reverse a judgment in action on the case upon several promises, in Stepney Court, because the plaintiff declared, that in consideration he permitted the defendant to enjoy several houses, without showing what title he had. Yelv.

227, 228, *Glasses' case*, and *Aylet v. Williams*, 3 Lev. 193, were cited. *E contra* it was said, that permission to enjoy, without showing any title, was a sufficient consideration. 1 Leon. 43; Cro. Jac. 498; 1 Lev. 304; 3 Lev. 150. An objection was made to the plea, that this action being founded on a collateral promise, and not on a contract for the rent, *nil habuit in tenementis*, as was pleaded in this case, was not a good plea, and of that opinion was the whole court; for if any one enjoys a benefit at his request, and by permission of another, that is a sufficient consideration for an assumpsit.

of B.; B. afterwards let the entire house to C., who sued A. in an action for the use and occupation, for the hire of the apartments: it was held, that A. could not impeach C.'s title (*k*). So where the occupier of a house had submitted to a distress for rent, stated in the notice of distress to be due from him as tenant to the distrainer; it was held, that this was an acknowledgment of the tenancy (*l*). So where A. had come into occupation under J. S., who had paid rent upon a distress by B.; it was held, that, after proof of the fact, A. was estopped to dispute B.'s title to the rent (*m*). So a person, who has occupied premises and paid rent to the apparent proprietor as his landlord, and who, when sued by him for the use and occupation, has paid money into court, cannot allege that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action; although the plaintiff, at the trial, discloses that fact in proving his own case (*n*). But the defendant may (*semble*) show that the plaintiff's title had expired, and that he is liable for the profits of the land to some third party, who has claimed them (*o*).

Where the plaintiff had mortgaged the premises before the defendant came into possession, and the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due *after* such notice; it was held, that under the general issue, the defendant might give these facts in evidence; for the notice was evidence that the subsequent holding was not by permission of the plaintiff as alleged in the declaration, but by permission of the mortgagee (*p*). But the giving notice by a mortgagee to a tenant let into possession subsequent to the mortgage does not *of itself* give any right of action; it is, if not repudiated by the tenant, evidence only, whence a contract to pay may be inferred by the jury (*q*). Thus a *plea* that the mortgagee gave the defendant (the tenant) notice to pay the rent to him, and that the defendant was accordingly liable to pay the rent to the mortgagee, is bad (*r*); although actual payment to the mortgagee would seem to be a defence. *S. C.* With regard to rent due *before* the notice, obedience to the mortgagee's notice, if a defence at all, must at all events be specially pleaded (*s*); and a recoveror in ejectment is, in this respect, in the same position as a mortgagee (*t*); but it would seem not to be a defence at all (*u*).

Note. Chapple cited a case, as ruled by Lord *Hardwicke*, where A., without title, gave possession of a house to B.; C., the owner, brought assumpsit for the use and enjoyment; but because B. did not receive his possession from C., nor anywise occupied under him, Lord *Hardwicke* held the action not maintainable by him.

(*k*) *Rennie v. Robinson*, 1 Bingh. 147.

(*l*) *Panton v. Jones*, 3 Campb. 372.

(*m*) *Cooper v. Blandy*, 1 B. N. C. 45.

(*n*) *Dolby v. Hes*, 11 A. & E. 335.

(*o*) *Mountnoy v. Collier*, 1 E. & B. 630.
But see *Wilton v. Dunn*, *infra*.

(*p*) *Waddilove v. Barnett*, 2 B. N. C. 538. See *ante*, p. 595.

(*q*) *Wyse v. Myers*, 4 Ir. L. R., N. S. 101.

(*r*) *Wilton v. Dunn*, 17 Q. B. 294.

(*s*) *Waddilove v. Barnett*, 2 B. N. C. 538.

(*t*) *Newport v. Hardy*, 2 D. & L. 921.

(*u*) *Boodle v. Campbell*, 7 M. & G. 386;
Selby v. Browne, 7 Q. B. 620.

In an action for use and occupation of glebe lands, it appeared that the former incumbent had let the lands in question to the defendant, who had continued tenant to the present incumbent, the plaintiff, and had paid him half a year's rent for the same. The action being brought for some arrears of rent, the defendant offered to give evidence of the plaintiff's having been simoniacally presented, of which, as it was stated, the defendant was ignorant, when he paid the former rent; but Lord *Kenyon*, C. J., refused to receive this evidence, being of opinion that the case fell within the common rule, that a tenant should not be permitted to impeach the title of his landlord in an action for use and occupation. There was a verdict accordingly for the plaintiff. The court of B. R., on motion for a new trial, concurred in opinion with the C. J. (v). But a tenant, though he cannot dispute his landlord's title at the time of the demise, may show that it has since expired (x).

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to this action (y). Thus where A. demised two houses to B. which B. underlet to C. and D. respectively, and, the houses being burnt down, A., in pursuance of a covenant to that effect in the lease to B., rebuilt them; but in the rebuilding of the premises, the area of C.'s premises was *decreased*, and that of D.'s *increased*, according to a plan approved of by B., but not by C. or D., neither of whom occupied after the fire, or consented in any way to the alteration of the premises; it was held, that B. could not recover for use and occupation either against C. or D. (z). "An eviction is an act of a permanent character done by the landlord in order to deprive, and which has the effect of depriving, the tenant of the use of the thing demised, or of a part of it," *per Willes*, J. S. C. But if there be a lawful eviction from part by an elder title, the rent is apportioned only, and not suspended (a).

There is no implied warranty on a lease of a house or of land, that it is, or shall be, reasonably fit for habitation or cultivation; and there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let (b); although in the case of the demise of a ready-furnished house for a temporary residence at a watering-place, it has been held, that there is such an implied condition (c); but this decision can only be upheld, if at all, on the ground that the

(v) *Cooke v. Loxley*, 5 T. R. 4, recognized in *Brooksby v. Watts*, 6 Taunt. 333. See *Cripps v. Blank*, 9 D. & R. 480.

(x) See *ante*, pp. 621, 1158; and *Claridge v. Mackenzie*, 4 M. & G. 143.

(y) *Smith v. Raleigh*, 3 Campb. 513.

(z) *Upton v. Townend*, 17 C. B. 30.

(a) *Neale v. Mackenzie*, 2 C. M. & R. 84; 1 M. & W. 747.

(b) *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68.

(c) *Smith v. Murrable*, 11 M. & W. 5.

contract was one of a mixed nature, being a bargain for a house *and furniture*, which was necessarily to be such as was fit for the purpose for which it was to be used. In a subsequent case, where the defendant was tenant from year to year of malting premises, which by reason of the default of the landlord in not repairing, according to his agreement so to do, had become unfit for malting purposes; it was held, that this was no defence to an action for use and occupation, for rent due subsequently to the premises becoming so unfit: if the landlord had entered into a covenant to repair, the mere breach thereof on his part would not justify the tenant in abandoning the premises: and such a consequence cannot be imported into a parol letting from year to year (*d*).

A., being in possession under a lease for years, underlet the premises, from year to year, to the defendants, who knew the extent or A.'s interest. The plaintiff, afterwards, took a lease of the same premises expectant on the determination of A.'s term, and the defendants, after the determination of A.'s term, continued in possession for a quarter of a year, when they paid rent for that period to the plaintiff, at the same rate they had previously paid to A., and claimed to give up possession. This was refused, and the premises remained unoccupied for some time. The plaintiff brought an action for use and occupation; but the C. J. held, that, the old tenancy having been determined, there was not any evidence of a new continuing tenancy, for the fact relied on admitted equally well of a different construction (*e*). So where defendant, who had occupied under a lease, which expired at Lady-day, 1829, paid a quarter's rent on Midsummer-day, 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid, at irregular intervals, by L., who had occupied the premises. In an action for use and occupation against the defendant, claiming two quarters' rent due at Lady-day, 1831; the judge left it to the jury to find whether the landlord had not accepted L. as the tenant; and, the jury having found for the defendant, the court refused to disturb the verdict (*f*). Where the defendant took premises from a testatrix, and subsequently to her decease paid rent to an agent of the family, who gave a receipt "on account of the family of the late Mrs. L.," it was held, that this was evidence of a joint letting, and that the plaintiffs, the appointees under the will of Mrs. L., might recover in use and occupation, as on a joint demise, though they were, in fact, tenants in common (*g*). A. lets lands to B., who underlets to C. and others; during these tenancies, A. gives notice to C. and the other under-tenants to quit, and C. does quit, and the lands before occupied by him remain unoccupied for a year,

(*d*) *Surplice v. Farnsworth*, 7 M. & G. 576. See further, as to the right of a tenant to withdraw from the tenancy, the judgment of *Tindal*, C. J., in *Izon v. Gorton*, 5 B. N. C. 501; and *Arden v.*

Pullen, 10 M. & W. 321.

(*e*) *Freeman v. Jury*, 1 M. & M. 19.

(*f*) *Woodcock v. Nuth*, 8 Bingh. 170.

(*g*) *Last v. Dinn*, 28 L. J., Ex. 94.

and are then again let by B.; A. cannot recover against B. for the use and occupation of this land for the year. And *semble*, under these circumstances, an eviction might be pleaded to the whole demand (*h*). The husband is not liable in an action for use and occupation, upon an occupation by the wife *dum sola*, not at the request of the husband (*i*).

In an action for use and occupation, if it appear that the premises were let to the defendant for the purposes of prostitution, the action cannot be sustained, the contract being *contra bonos mores* (*k*); but where the premises are not let to the defendant for the purposes of prostitution, the defendant cannot evade the payment of a fair rent, although she prove that she has used them for those purposes (*l*). In an action for use and occupation of a lodging under a weekly tenancy, where it did not appear that the lodging was originally let for the purposes of prostitution; it was held, that the plaintiff could not recover the weekly rent, which had accrued, after he was fully informed that the defendant occupied the lodging for the purposes of prostitution (*m*). See further on this subject, *ante*, p. 80.

Assumpsit for use and occupation: on examination of a witness who proved the occupation by defendant, it appeared that there had been an agreement in writing, but not stamped. It was contended, by plaintiff's counsel, that the agreement not having been stamped, was not binding on the parties, and that therefore the plaintiff might waive this, and go into evidence generally for use and occupation. It was insisted for defendant, that it appeared that the defendant held under a written contract, and therefore that the plaintiff was bound to give it in evidence. *Eldon*, C. J., was of this opinion; observing, that this being a specific contract between plaintiff and defendant, the plaintiff is bound to show what that contract was: it may contain clauses which may prevent plaintiff from recovering; others for the benefit of defendant, which he had a right to have produced: but the contract not being stamped, it could not be given in evidence (*n*), therefore the plaintiff must be

(*h*) *Burn v. Phelps*, 1 Sta. 94.

(*i*) *Richardson v. Hall*, 1 B. & B. 50.

(*k*) *Girarday v. Richardson*, 1 Esp. 13.

So the first publisher of a libellous and immoral work cannot maintain an action against any person for publishing a pirated edition. *Stockdale v. Onwhyn*, 5 B. & C. 173. In *Poplett v. Stockdale*, 2 C. & P. 198, it was held that the printer could not recover against the publisher.

(*l*) *Wiggins v. George*, per *Abbott*, C. J., *Middx. Sitt.* after E. T. 5 Geo. IV.

(*m*) *Jennings v. Throgmorton*, Ry. & M. 251.

(*n*) See *R. v. The Inhabitants of St. Paul's, Bedford*, 6 T. R. 452; and *Buxton v. Cornish*, 12 M. & W. 426, recognizing *Vincent v. Cole*, 3 C. & P. 481; *M. & Malk.* 257, by which Lord Tenterden had overruled the dictum of *Bayley*, J., in *R. v. Pendleton*, 15 East, 449. By 17 & 18 Vict. c. 125, s. 28, all such instruments as may be stamped after execution, may be received in evidence, if the party who tenders them is prepared at the trial to pay to the officer of the court, the proper duty and penalty.

nonsuited (o). But where one of the plaintiff's witnesses, on cross-examination, said he had heard from the plaintiff's attorney, that there was an agreement in writing; this was held no evidence of its existence, so as to render its production by the plaintiff necessary (p).

An action for use and occupation is maintainable, without attornment, upon the 4 & 5 Ann. c. 16, ss. 9 and 10, by the trustees of one, whose title the tenant (defendant) had notice of, before he paid over his rent to his original landlord, although the tenant had no notice of the legal title being in the plaintiffs on the record (q).

(o) *Brewer v. Palmer*, 3 Esp. 213.

(p) *Watson v. King*, 3 C. B. 608.

(q) *Lumley v. Hodgson*, 16 East, 99.

BANKRUPT.

In reference to this title, see the Advertisement in Volume I.

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